89-443 (1)

NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CAJUN ELECTRIC POWER COOPERATIVE
Applicants

V.

THE LOUISIANA PUBLIC SERVICE COMMISSION
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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September 7, 1989

105 pp

QUESTION PRESENTED FOR REVIEW

Whether the supremacy clause, U.S. Const. art. VI, cl. 2, the Rural Electrification Act, 7 U.S.C.A. sec. 901 et seq. (West 1988), and the present regulatory practice of the Rural Electrification Administration over Cajun Electric Power Cooperative, Inc., a generation and transmission cooperative, and Cajun's member distribution cooperatives, pre-empts the regulation of Cajun and its members by the Louisiana Public Service Commission.

LIST OF ALL PARTIES

Cajun Electric Power Cooperative, Inc.

Southwest Louisiana Electric Membership Corporation

Teche Electric Cooperative, Inc.

Claiborne Electric Cooperative, Inc.

Jefferson Davis Electric Cooperative, Inc.

Northeast Louisiana Power Cooperative, Inc.

South Louisiana Electric Cooperative Association

The Louisiana Public Service Commission

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JURISDICTIONAL STATEMENT

On the 3rd day of May, 1989, the Supreme Court of the State of Louisiana, on rehearing, by a four to three vote with two written dissents, reversed its prior decision in this cause and ruled that Cajun Electric Power Cooperative, Inc. and its various member distribution cooperatives which are parties to this litigation were subject to the rate making and service regulation jurisdiction of the Louisiana Public Service Commission. A subsequent request for rehearing was denied on June 15, 1989, making the judgment a final judgment of the court of last resort in the State of Louisiana. This judgment was entered in spite of Applicants' argument that state regulatory jurisdiction over Cajun and its members which joined in the state court action is violative of the supremacy clause of the United States Constitution, the Rural Electrification Act, and the comprehensive exercise of regulatory authority exercised over your applicants by the Rural Electrification Administration. The jurisdiction of this court is therefore based upon 28 U.S.C.A. sec. 1257 (a) (West 1988).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

United States Constitution

U.S. Const. Art. VI cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Statutes

7 U.S.C.A. § 901 et seq. (West 1988)

State Constitutional Provisions

La. Const. of 1974 art. IV, § 21 (b) (1974)

> (B) Powers and Duties. The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

State Statutes

La. Rev. Stat. Ann. § 45:1163 (West 1988)

> A. The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished such public utlities; however, no aspect of direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in the direct sale of natural gas to industrial users for fuel for utilization in any manufacturing process shall be subject to such regulation by the commission. In addition, a schedule of rates of an electric cooperative shall not require approval of the commission if the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, nor shall the authority of the commission extend to the service rendered by electric cooperatives . . .

La. Rev. Stat. Ann. § 45:121

> The term "electric public utility" as used in this Chapter means any person furnishing electric service within this state, the parish of Orleans excepted, including any electric cooperative transaction business in this state . . .

La. Rev. Stat. Ann. § 12:401 et seq. (West 1988)

STATEMENT OF THE CASE

This case began as a challenge by Cajun Electric Power Cooperative, Inc., ("Cajun"), and some of its member distribution cooperatives, ("members"), to Louisiana Public Service Commission, ("PSC"), Order 8-87, which, in clear contravention of state statute, La. Rev. Stat. Ann. Sec. 45:1163 (West 1988), purported to assert plenary rate making and service regulation jurisdiction over Cajun and its members, and at that time, the Public Service Commission's order reflected its intent to reduce cooperative rates by fifty (50%) percent. See Appendix pp. 77a-80a. In a suit to enjoin the exercise of such jurisdiction, Cajun and its members argued that the unilateral assertion of jurisdiction by the PSC violated state and Federal law, which included the Rural Electrification Act, 7 U.S.C.A. Sec. 901 et seq (West 1988), and the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

The trial Court ruled that the state statute in question, La. Rev. Stat. Ann. Sec. 45:1163 (West 1988), is unconstitutional, contravening La. Const. art. IV Sec. 21(b) (1974). Accordingly, the trial Court dismissed the Suit of Applicants and rejected Applicant's arguments for Federal pre-emption, see Appendix pp. 1a-9a. The matter was appealed by Cajun Electric Power Cooperative, Inc. to the Louisiana Supreme Court, where, again, as specification of error and in argument, Cajun and its members asserted that Federal law and the current regulatory practice of a Federal agency, the Rural Electrification Administration, pre-empted, in the circumstances of this case, the state regulatory scheme exercised by the Public Service Commission.

In a four to three decision rendered on the 31st day of October, 1988, the Louisiana Supreme Court agreed with Cajun and its members, holding that the state statutory

exemption of rural electric cooperatives from PSC jurisdiction was not contrary to the provisions of the Louisiana Constitution and further that pervasive interaction between Cajun and its members with the Rural Electrification Administration gave credence to the court's result and state constitutional interpretation. See Appendix pp. 10a-47a.

After an application for rehearing on behalf of the PSC was granted, the State Supreme Court, on rehearing, see Appendix pp. 10a-34a, reversed its prior decision on the state constitutional issue and expressed the following with respect to the Federal pre-emption issue:

> "In 1935, President Roosevelt established the Rural Electrification Administration ("REA"), in order to provide government loans at low interest rates to encourage electric service development in rural areas. As the Supreme Court has noted, the REA is a "lending agency rather than a classic public utility regulatory body . . ." *Arkansas Electric Cooperative Corporation*, 461 US at 386. As such, it performs its role within state regulatory schemes. Id. Accordingly, state rate regulation of REA financed cooperatives is not preempted by the Rural Electrification Act. Id. at 3085." See Appendix pp. 42a-43a.

As is evident from its opinion, terse consideration, at best, was given by the Louisiana Supreme Court's new majority to the pre-emption issue previously raised and argued despite voluminous evidence and testimony offered on the issue. Following a denial of Applicant's request for rehearing on June 15, 1989, see Appendix pp. 74a-76a, the decision was made by Applicants to seek a writ of certiorari to this Honorable Supreme Court.

ARGUMENT

Cajun and its members are abundantly aware of this court's decision in *Arkansas Electric Cooperative, Inc. vs. Arkansas Public Service Commission*, 461 US 375, 103 S.Ct. 1905, 76 L.Ed.2d 1, (1983), wherein it was held that there was "nothing in the Rural Electrification Act expressly pre-empting state regulation of power cooperatives financed by the REA". *Arkansas Electric*, supra at p. 385.

The most significant portion of the *Arkansas Electric* decision, as the law relates to this case, however, was expressed by the Court as follows:

> "There may come a time when the REA changes it's present policy, and announces that state regulation of rural cooperatives is inconsistent with Federal policy. If that were to happen, and such a rule was valid under the Rural Electrification Act, it would of course preempt any further exercise of jurisdiction by the Arkansas Public Service Commission. (Citations omitted) ... Moreover, even without an explicit statement from REA, a particular rate set by the Arkansas PSC may so seriously compromise important Federal interests, including the ability of AECC to repay its loans, as to be implicitly preempted by the Rural Electrification Act." Id.

It is, and has been throughout the litigation of this cause, respectfully urged that the current financial condition of Cajun, (see testimony of David Mohre, infra) and its present relationship with the REA, has given rise to manifest inconsistency of PSC regulation of Cajun and its members with Federal policy. Inasmuch as the member cooperatives which

are parties hereto are interrelated with Cajun through their long term all requirements power contracts, with Cajun, PSC regulation of these members is inconsistent with Federal policy as well.

Cajun and its members are incorporated in the State of Louisiana as nonprofit electric cooperatives pursuant to La. Rev. Stat. Ann. Sec. 12:401 et seq (West 1988). Collectively, Louisiana Rural Electric Cooperatives provide energy to approximately one million member-owners throughout the State of Louisiana and ten percent (10%) of the electrical energy consumed nationwide is provided by rural electric cooperatives. The United States Federal Government's involvement with Rural Electric Cooperatives is substantial inasmuch as over ten billion dollars nationwide is on loan to Rural Electric Cooperatives, either directly from the Rural Electrification Administration (REA) or through REA guaranteed loans. *Cajun is the largest of REA's debtors with indebtedness presently in excess of three billion dollars.* As can be readily observed, REA's interest in the financial integrity of Cajun is of major concern.

The REA requires as security for its loan and loan guarantees, long-term all requirements power supply contracts between G&T cooperatives and member distribution cooperatives. These all-requirements contracts provide that the rate schedule and any revision of the rates therein must be approved by REA in order to assure the REA that the cash flow will be sufficient to service the debts of each G&T and distribution cooperative borrower. *Tri-State Generation and Transmission Association, Inc., et al., vs. Shoshone River Power, Inc.*, 874 F.2d 1346, (10th Cir., 1989). The existence of these long-term all requirements contracts as security for REA loans and loan guarantees forms the financial anchor of the rural electrification system. The system is interdependent, with each cooperative relying on the strength of

the others. So long as each cooperative is viable, REA obligations are repaid and money is available for other potential REA borrowers.

As was evidenced in the present litigation, since the *Arkansas Electric* decision, the REA has adopted a new policy in its dealing with cooperatives such as Cajun in view of the grave financial consequences to the Federal government attendant upon any possible failure of large borrowers.

At trial on the merits, the deposition of Mr. Thomas Heath was admitted into evidence as plaintiff's exhibit P-1 without objection from counsel for the defendant. Trial Transcript Vol. I at pp. 8 - 9.

Mr. Heath, Deputy Administrator of REA, testified that REA has recently established a new task force due to difficulties which several borrowers from REA are presently encountering. Heath deposition p. 6. The task force was established with the specific purpose of addressing a resolution to those financial difficulties, especially those of Cajun. Heath Deposition p. 67. Mr. Heath further testified that Cajun's three billion dollar debt to REA is the largest in the United States. Mr. Heath, as Deputy Administrator of the REA in charge of the special task force, testified that Cajun's debt is a matter of great significance to REA, thereby an important Federal interest, and one of the motivational factors behind creation of the task force to resolve the debt situation. See Heath deposition p. 67 and 68.

REA's new policy with respect to protection of the Federal interest in Cajun's debt could not be more clearly exemplified than by correspondence between the REA and Cajun wherein Cajun was advised that "... this letter will serve to notify you not to implement any rate changes." See Heath deposition p. 102 and Exhibit No. 2 to Heath Deposition.

The evidence adduced in this case unequivocally establishes that, based upon conditions presently existing, REA's policy to regulate Cajun is pervasive, and any modifications of rates by the Louisiana Public Service Commission would be inconsistent with this policy.

Inherently, the regulation of rural electric cooperatives is markedly different from state regulation of investor owned public utilities. In *Salt River Project Agricultural Improvement and Power District, et al. vs. Federal Power Commission*, 391 F.2d 470, (D.C. Cir., 1968), reh. den. (1968), the District of Columbia Court of Appeals described rural electric cooperatives as follows:

> "Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transaction with the cooperative from which they can earn any profit." Id.

From the above, several important characteristics of electric cooperatives are apparent. First and foremost, cooperatives

are non-profit entities. As such there is no incentive for cooperative electricity rates to be any higher than required to meet REA debt service obligations and pay operating expenses. There are no shareholders requiring dividends derived from profits. There are no owners who will financially benefit with money generated from the sale of electricity. There are no officers or directors expecting bonuses.

Another key characteristic of rural electric cooperatives is that they are wholly member-consumer owned. Each member-consumer is given the right to vote for a director to represent his or her interest. Director elections are regularly held and are usually very competitive. The directors elected to represent the member-consumers are themselves member-consumers and are as concerned with the utility rates and effective cooperative management as those member-consumers who elected the Board of Directors. Directors who engage in mismanagement or who are otherwise ineffective are routinely ousted from office by dissatisfied member-consumers. The Board of Directors of a cooperative assures that competent people are hired to handle the day to day affairs of the cooperative. Mismanagement is dealt with at the rural electric cooperative level in the same manner as a Fortune 500 company handles the problem; by dismissal.

The members of the Board of Directors of a cooperative such as Cajun, which generates and transmits, (as distinguished from distributing), are representatives of member-owner distribution cooperatives. This structure effectively insures that the wholesale rates that the distribution cooperatives pay for power are no higher than required to provide cost of operation, including debt service. This point was noticed by this Court in *Arkansas Electric Cooperative Corp., vs. Arkansas Public Service Commission*, (supra). In a footnote to the opinion in that case, this Court stated:

> "Moreover, if the retail rates are found unreasonable (by virtue of the wholesale rates being unreasonable), it seems likely that the retail cooperatives will, through their representatives on AECC's [the G&T cooperative] Board of Directors, vote for a reduction in the wholesale rates." Id.

The directors also assure that proper REA procedure is followed in the cooperative's operations. This includes securing required REA approvals, initiating and defending litigation, and overseeing rate calculation and implementation. Director responsibility also includes consideration of construction projects, solicitation of new customers, legislative interaction to promote cooperative interests, public relations and approval of capital expenditures.

Day to day interaction with REA and supervision by REA is another characteristic unique to rural electric cooperatives.

> "The REA borrower as a condition of securing its loan must secure REA approval of its manager, engineer and counsel; of its construction contracts for purchases of materials, equipment and supplies; of its insurance coverage, its purchase of land, and so on." *Salt River Project Agricultural Improvements and Power District, et al., vs. Federal Power Commission*, (supra).

Further, the Administrator of the REA "has virtually absolute discretion and exercises extensive and rigid supervision and control" over the REA borrowers. "The cooperative's books and records must be kept in accordance with the REA Uniform System of Accounts", and a cooperative may not "merge or consolidate, or sell or encumber any of its property without REA approval," *Dairyland Power Cooperative, et al.*, 37 FPC 12, (1967).

Arguing the need for state regulation, at trial on the merits, and throughout this litigation, it has been urged by the PSC that REA is not a "regulatory" body.

Testimony at trial was voluminous and without contradiction to show that REA's day to day interaction with its rural electric borrowers is much more than the typical lender borrower relationship.

The testimony of Mr. David Mohre, General Manager for Cajun Electric Power Cooperative, Inc., was clear and uncontroverted.

> "Well, let me first start with the relationship between Cajun and REA, or any generation and transmission cooperative and REA. *First off, I would describe the relationship as one of pervasive interaction.* To a great extent REA controls the fundamental issues of merit, figures of merit, that Cajun as a cooperative supplier of electricity to its members much achieve. For instance, REA publishes bulletins that tell such things as the basis for decisions on investment and generating plants. They describe very specifically a process that will allow REA to said yah or nay to a borrower building a plant, for instance. You have to develop power supply studies and present them to REA showing alternative facilities, whether you're going to build a coal plant, a nuclear plant, a gas-fired power plant, et cetera. *And you must follow the REA practice as described in the bulletin.* And REA uses that information and helps makes decisions. Whether they agree that

your choice was correct or not. *REA publishes rules to the reliability of operation of a—of the distribution co-op and the generation and transmission cooperative. This is not too dissimilar from, for instance, the reliability requirements that maybe a commission may have in terms of outage hours for a customer.* REA also has reliability standards that show you shouldn't be—your customers should not be out of service any more than so many hours per year. So they have reliability of service standards. REA's bulletins basically describe very simply the accounting practices, and in many cases allocation practices that Cajun has to employ . . . Allocation of costs. These are generally similar to the FERC requirement, the Federal Energy Regulatory Commission Requirements, on accounting and procedures. And they at some level follow, GAAPP, Generally Accepted Accounting Principles and Practices. REA has environmental requirements. REA—generally a subset of EPA. *REA has requirements to meet technical standards for the construction of facilities, transmission line practices and standards, literally down to the design of the structure and the support mechanisms and the kinds of lightening arresters that are used, things like that . . . They are certainly woven into the procedures that we have to follow.* So from the standpoint of REA's interaction with Cajun, it's very pervasive. It is equally pervasive with regard to their interaction with distribution cooperatives. I'd say the two differences is—that I can think of immediately are the size of the dollars involved. The cost of a power plant

is enormous; and the decision process there. REA also approves, for instance, in many cases the contracts that we have to purchase fuel under. For instance, in the construction of our coal-fired power plants—and again, I'm using the written word here "cause I was not at Cajun at the time. REA had requirements that the contracts had to be life of the unit and describe rather specifically the kinds of contractual relationships that Cajun must have with its coal suppliers, with its railroad, with its barge suppliers. *So there's a pervasive day-today interactive kind of relationship.* REA sends in auditors. You know, occasionally somebody will knock on my door and show up and say "Hey, I'm your friendly REA auditor." And they will come in and they'll look at a certain element of our coperation. *It has been suggested frequently that REA is simply a big bank. As a matter of fact, depending on the administration in Washington, some would say—they would say sometimes it's a bank, and others would say, no, it's a far different thing. And I have been in an environment where I have seen both. But the fact of the matter is the pervasiveness of REA's interaction with Cajun and the cooperatives is day-today, year-by-year and continuing, for as long as I've been in the program, which is currently eight years.*" Tr. Vol. I at 96-99.

In response to an allegation by counsel to the Commission, that the cooperative/REA relationship was merely one of lender/borrower, Mr. Mohre noted:

> "I disagree on that characterization very much. It is more than a lender/borrower relationship. Lenders do not tell borrowers what they can and cannot do, what kind of operating statistics they should have, what kind of reliability they should have, how to build their lines. It's a much different kind of relationship than that. I thought we dealt with that yesterday." Tr. Vol. II at 7.

The testimony of Mr. Arthur Verret, General Manager of Teche Electric Cooperative, Inc., exemplifies the degree to which REA monitoring innundates daily cooperative business

> "Well, at one time the cooperative was using second-hand material, and we had to go back to using REA-approved material. REA required that you use material according to their specification's. We had built a sub-station and the fence height did not meet requirements. We had some fire ants in the sub-station that the REA engineer complained about. We had to get rid of the fire ants in the sub-station. We had excessive outages they were complaining about. Our system had outages in excess of five hours per consumer per year, which is not in conformance with REA regulations. We had to have all our large power meters tested and calibrated according to their criteria. We had to install more guys and anchors, guy markers. We had

> to implement a sectionalizing study. Basically that's the general outline." Tr. Vol. II at 29.

See, also the testimony of Mr. Leon Mocek, General Manager for SLEMCO:

> With reference to work orders, of course REA controls the way you handle all material and warehousing, which is processed through a work order system. SLEMCO used to charge material out, some areas of material in bulk. REA requires that our—I guess you would say called us down a couple of years ago and required that we change our work order system so that we would have a system that would charge all material out on an individual item basis. As a result of that we had to go to a new system. During the interim, before we got the system going, they cut off our funds, as far as borrowing money from REA. And we could not receive any of those funds. And we had to go out on the open market to get funds until such time that we initiated the new work order system, which required a new computer system in order to implement this work order system." Tr. Vol. II at 106.

It is unlikely that investor owned utilities are subjected to such pervasive oversight. State regulation in this arena would only serve to duplicate regulatory efforts. Such duplicative efforts do not effectuate a legitimate local public interest and directly conflict with REA's mandate to Cajun that it not change its rates.

Directly conflicting with REA policy is the unilateral act of the Louisiana Public Service Commission in its Special

Order 8-87 wherein the PSC's stated its position that cooperative rates in the State of Louisiana are fifty percent (50%) too high.

> "The rates charges by electric cooperatives in Louisiana, on average, are approximately fifty percent higher than those paid by customers of investor-owned utilities in the state. In some instances, cooperative customers pay almost twice as much as investor-owned companies for their electricity . . .
>
> Because of these and other problems facing the cooperatives and their customers, the Commission believes that it must reaffirm its jurisdiction over the cooperatives and actively regulate the rates charged and services provided by these entities." See Special Order 8-87 at p. 2. Appendix pp. 771-80a.

The controversy foretold by the conflicting views of the PSC and REA is apparent. REA has instructed Cajun not to make any rate modifications without specific REA approval, and the PSC had indicated that the current rates of Cajun, as approved by the REA, are in its opinion fifty percent too high. Any actions by the PSC to affect the rates of Cajun, will undoubtedly compromise a very substantial debt owed to the Federal government, and directly conflict with a substantial interest espoused by the REA.

Regarding issues of rate regulation, Cajun's member distribution cooperatives cannot be distinguished from Cajun. All of the other original plainitffs in this litigation, as distribution cooperatives, are, by REA directive, inextricably interwoven with Cajun as a result of the all power contracts, trial exhibit P-5, which operate to mandate that the member

cooperatives purchase all of their power needs from Cajun, at rates established for Cajun. Therefore, the rates of the distribution cooperatives are controlled by Cajun's rates, which as hereinabove noted, are presently unswervingly controlled by REA.

Concluding, it is respectfully but vehemently urged that the era of REA regulation of rural electric cooperatives foretold by this Court's opinion in *Arkansas Electric* has arrived in Louisiana. State regulation of any kind or character over a three billion dollar Federal borrower in tedious financial circumstances, without doubt, directly impacts significant Federal interests.

This Court has recognized that a particular rate set by a state public service commission may so seriously compromise important Federal interests, including the ability of the cooperative to repay its loans, as to be implictly pre-empted by the Rural Electrification Act. By virtue of the fact that since the *Arkansas Electric* decision, Cajun is now engaged in a financial workout with REA, we respectfully suggest that any regulation of Cajun and its members by the Louisiana Public Service Commission, especially with the intent revealed by the Louisiana Public Service Commission, seriously compromises important Federal interests.

The disregard of Federal interests here presented by the Louisiana Public Service Commission regulation of REA borrowers crosses the threshold recognized by the Court in *Arkansas Electric*. The Public Service Commission has served notice that it will review and reverse plans made by cooperatives and relied upon by the REA in its loan making decisions. Such interference with the Rural Electrification System by the Louisiana Public Service Commission endangers the very existence of the Rural Electrification Program.

Respectfully submitted,

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APPENDIX

NUMBER 321,610 DIVISION "L"

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

CAJUN ELECTRIC POWER
COOPERATIVE, INC., ET AL

VERSUS

THE LOUISIANA PUBLIC
SERVICE COMMISSION

WRITTEN REASONS FOR JUDGMENT

This case arises out of Special Order 8-87 dated September 3, 1987 of the Public Service Commission. In that order the Public Service Commission asserted the jurisdiction over the plaintiff-cooperatives and issued a subsequent order directing the plaintiffs to appear before the Commission for purposes of asserting any opposition they may have to the exercise of jurisdiction over the cooperatives by the Commission. The plaintiffs seek a declaratory judgment interpreting R.S. 45:1163 and Article IV, Section 21(B) of the Louisiana Constitution. The plaintiffs contend that, by virtue of R.S. 45:1163, they are exempt from the jurisdiction of the Public Service Commission. Article IV, Section 21(B) of the Louisiana Constitution of 1974 provides as follows:

> "The Commission shall regulate all common carriers and public utilities and shall have such other regulatory authority as provided by law."

Two questions are presented in this petition for declaratory judgment concerning the proper interpretation of the constitutional provision. They are as follows: 1) "Are the plaintiff cooperatives public utilities within the meaning of this Article?" and 2) "Does the legislature have the authority to provide by law limits on the jurisdiction of the Public Service Commission?" The next issue presented by the lawsuit necessarily depends upon the interpretation of the constitutional provision and the revised statute in question, because if the Public Service Commission lacks the jurisdiction over the plaintiff-cooperatives, then it is proceeding contrary to law by attempting to assert jurisdiction and is thus subject to the injunctive powers of this Court.

The first question concerning the nature of the plaintiff-cooperatives as public utilities is answered in the affirmative. The Constitution appears to grant to the Commission complete and absolute jurisdiction over all public utilities. The Constitution does not define "public utility." The plaintiff-electric cooperatives possess and exercise all the characteristics, attributes, powers and activities generally associated with public utilities. They have a monopoly on production and transmission of power; they are assigned geographic territories in which they have no competition; and they provide a necessary product to their customers. As stated by counsel for the Commission the cooperatives are "obligated to serve their service territory, through permanent connections. Cooperatives, like investor-owned utilities, charge different rates to different customer classes. An expert witness for the electric cooperatives, Norman Clapp, testified that the electric cooperatives compose one type of public utility." For all these reasons the Court finds that the plaintiff-electric cooperatives are "public utilities" within the meaning of the Constitution.

The next question involves an interpretation of the Louisiana Constitution of 1974 Article IV, Section 21(B), with respect to the latter portion of that Article which reads "and have such other regulatory authority as provided by law." The issue is, does the phrase "as provided by law" refer to the other regulatory authority of the Commission or to all the regulatory authority of the Commission? Since the wording of this Article is not completely clear and is somewhat ambiguous, a resort to the of records of the constitutional convention in adopting this Article is helpful in determining its meaning. According to the minutes of that convention, the original constitutional provision read: "The Commission shall regulate all common carriers and public utilities as provided by law." This particular phraseology was not adopted by the convention because an amendment was offered by Mr. Patrick Juneau, a delegate to the convention, to change it to its current language. Talking in support of his proposed amendment, Mr. Juneau made the following statement:

> "If we are going to leave this language alone, you are making a drastic change in the current law . . . I think the intent was, of this convention to put the authority to regulate common carriers and public utilities in the exclusive jurisdiction of the Public Service Commission". (*Rec. of 1973, Cons. Conv.*, Tr., Bol. IX, P. 3746.)

It seems clear from the change in language and the arguments advanced by Mr. Juneau that it was the intent of the convention to vest all regulatory authority over common carriers and utilities in the Public Service Commission and it further envisioned a grant of other regulatory authority as the legislature may from time to time provide by law. Support for this position is found in the exchange between delegate Pat Juneau and delegate Woody Jenkins (*ID.* at p. 3347).

Additional support for this conclusion is found in the comments of delegate Derbes (*ID.* at p. 3348). Although there is some debate and other arguments as pointed out by counsel for the plaintiffs that lends some support to their interpretation of the debate and the amendment by Juneau, this Court believes that the better argument lies in favor of a finding that the convention intended to invest in the Public Service Commission, the full authority to regulate all public utilities. Furthermore, this Court believes that the Supreme Court has accepted that argument in its ruling in the case of *Dixie Electric Membership Corporation vs. Louisiana Public Service Commission*, No. 86-CA-2331. In that case, the court made the following statement: "We find persuasive the argument that the commissioners' constitutional authority could not have been and was not interrupted between 1978 and 1984." The dicta in this opinion clearly indicates that the Supreme Court believes that the Public Service Commission has full regulatory authority over all Louisiana public cooperatives.

The attempt by the legislature to limit the authority and power of the Public Service Commission to regulate the public cooperatives by the passage of R.S. 45:1163 is next presented. There is no specific request to this Court to declare this particular statute unconstitutional, although oral arguments to that effect have been advanced. It is this Court's opinion that the Louisiana Supreme Court has already in the *Dixie* case made clear that the legislature is without authority to limit the regulatory power of the Public Service Commission over Louisiana's electric cooperatives. A great deal of time was spent in the developing the record in this case to determine whether or not the REA approval relied upon by the cooperatives was by type of approval contemplated by R.S. 45:1163. Since this Court has interpreted the Supreme Court's opinion in the *Dixie* case to mean that the legislature was without the authority to interfere with the Public Service Commission's jurisdiction

over the cooperatives, it is unnecessary to decide this issue at this time.

The Court next turns to the final argument advanced by the plaintiffs in this case. Stated briefly, it is the position of the defendants that the United States Constitution and the Acts of Congress have preempted the state regulatory commissions from regulating the rates and charges of electric cooperatives within the various states. However, this position and argument has already been addressed by the United States Supreme Court in the case of *Arkansas Electric Cooperative Corporation vs. Arkansas Public Service Commission*, 103 Supreme Court 1950 (1983). In that case, the argument was advanced that the Rural Electrification Act required that the states be preempted on the issue of rate regulation. The court in that case, as the Court does here, rejected that argument. The Supreme Court in that case said:

> "The legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in asserting the fledgling rural power cooperative in selling their structures, it would do so within the constraints of existing state regulatory schemes."

The Court also found that the REA has accepted the state regulation of the cooperatives. In addition to resting on the opinion of the Supreme Court noted above, the Court finds nothing in the record made at the trial of this matter which would indicate any attempt on the part of the Rural Electrification Administration to preempt the state's authority to regulate rates. The procedure utilized by the REA in examining the rates and approving the rates of the various cooperatives is one that does not lend itself to a careful study of all of the issues involved in rate regulation. The entire

interest of the REA seems to be geared toward guaranteeing sufficient rates in order for the various cooperatives to meet their debt obligations. The evidence in the record does not indicate that the REA in any way, acts as a watch dog over rate regulations. For these reasons this Court concludes that the power of the Public Service Commission to exercise its jurisdiction over the plaintiff-public cooperatives is not preempted by federal law.

The Court finds in the record two exceptions advanced by the defendant. The declinatory exception of lack of subject matter jurisdiction and the dilatory exception of prematurity were filed by the defendants. Neither of these exceptions have been argued and they are deemed by this Court to have been abandoned.

For the foregoing reasons, the request for injunctive relief will be denied based on the finding by this Court that the Public Service Commission is not proceeding contrary to law. Further, a declaratory judgment will be entered, to be prepared by counsel for the defendant, declaring that the Public Service Commission has authority to regulate the plaintiffs herein and further declaring that this authority is not preempted by federal law. Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 28 day of February, 1988.

s/s Doug Gonzales
DOUGLAS M. GONZALES, Judge
Division "L"

A TRUE COPY
MAR 4 1988
s/s Libby Hardaway
DY. CLERK OF COURT
(stamp)

FILED
FEB 28 1988
s/s Libby Hardaway
DY CLERK OF COURT
(stamp)

19TH JUDICIAL DISTRICT COURT

NUMBER: 321,610

DIVISION "L"

PARISH OF EAST BATON ROUGE, LOUISIANA

CAJUN ELECTRIC POWER COOPERATIVE, INC., SOUTHWEST LOUISIANA ELECTRIC MEMBERSHIP CORPORATION, CLAIBORNE ELECTRIC COOPERATIVE, INC., JEFFERSON DAVIS ELECTRIC COOPERATIVE, INC., NORTHEAST LOUISIANA POWER COOPERATIVE, INC., SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, and TECHE ELECTRIC COOPERATIVE, INC.

VERSUS

THE LOUISIANA PUBLIC SERVICE COMMISSION

FILED: _____ _____

DEPUTY CLERK

JUDGMENT

This case was tried on October 26 and 27, 1987.

Present:

Mr. John Schwab and Mr. James Thornton
Counsel for Cajun Electric Power
Cooperative, Inc.
Mr. W. Marshall Shaw
Counsel for Claibone Electric
Cooperative, Inc.

Mr. Wendel Miller
Counsel for Jefferson Davis Electric
Cooperative, Inc.;
Mr. Rudolph McIntyre
Counsel for Northeast Louisiana Power
Cooperative, Inc.
Mr. James J. Davidson, III
Mr. Theodore Edwards
Counsel for Southwest Louisiana Electric
Membership Corporation
Mr. James Funderburk
Counsel for South Louisiana Electric
Cooperative Association
Mr. James Supple
Counsel for Teche Electric
Cooperative, Inc.
Mr. Michael Fontham
Mr. Noel Darce
Counsel for the Louisiana Public Service
Commission

After the conclusion of the trial, the Court heard the arguments of counsel, the case was taken under advisement, and counsel were ordered to submit post-trial memoranda of authority by November 12, 1987. Post-trial oral argument was held on November 19, 1987.

The Court now concluding that the law and the evidence are in favor of the Louisiana Public Service Commission, establishing that the Commission has full authority and jurisdiction to regulate the rates and services of the plaintiff electric cooperatives and establishing that the Commission's authority is not preempted by federal law, for the reasons assigned in the Written Reasons for Judgment issued by this Court and filed into the record on February 28, 1988:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. There be judgment in favor of the defendant, Louisiana Public Service Commission and against the plaintiffs, Cajun Electric Power Cooperative, Inc., Southwest Louisiana Electric Membership Corporation, Claiborne Electric Cooperative, Inc., Jefferson Davis Electric Cooperative, Inc., Northeast Louisiana Power Cooperative, Inc., South Louisiana Electric Cooperative Association and Teche Electric Cooperative, Inc. ("Plaintiffs"), dismissing this proceeding and the Plaintiffs' request for injunction and declaratory relief, with prejudice, and assessing all costs of this proceeding against the Plaintiffs.

JUDGMENT READ AND SIGNED in open court in Baton Rouge, Louisiana, this 10 day of March 1988.

s/s Doug Gonzales
JUDGE

FILED March 10, 1988
(SIGNED) Libby Hardaway
DY. CLERK
A TRUE COPY March 11, 1988
s/s Libby Hardaway
DY. CLERK
(stamp)

CAJUN ELECTRIC POWER COOPERATIVE, INC., et al.

v.

The LOUISIANA PUBLIC SERVICE COMMISSION.

No. 88-CA-1719.

Supreme Court of Louisiana.

Oct. 31, 1988.

Rehearing Granted Dec. 15, 1988.

Rural Electrical Cooperatives sought declaratory judgment that they were not public utilities within meaning of Public Service Commission constitutional article and that statutes removing Commission's authority over them were constitutional. The Nineteenth Judicial District Court, East Baton Rouge Parish, Douglas Gonazales, J., found the cooperatives public utilities and laws exempting them from regulation unconstitutional. On appeal, the Supreme Court, Watson, J., held that rural electrical cooperatives were not public utilities within meaning of State Constitution and not subject to regulation absent statutory authority.

Reversed.

Cole, J., concurred and assigned additional reasons.

Dennis and Calogero, JJ., dissented with assigned reasons.

Lemmon, J., dissented and assigned reasons.

Electricity KEY 1

Rural electrical cooperatives created by federal law are not "public utilities" within meaning of Public Service Commission constitutional article and Commission had no authority over them except as granted by statute. LSA-R.S. 12:401 et seq., 12:409, subd. G(3)(a, b), 45:121 et seq., 45:123, 45:1161 et seq., 45:1163; LSA-Const. Art. 4, § 21(B); Rural Electrification Act of 1936, § 1 et seq., 7 U.S.C.A. § 901 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

John Schwab, Schwab & Walter, Baton Rouge, James J. Thornton, Johnston & Thornton, Shreveport, W.M. Shaw, Shaw & Shaw, Homer, E. Rudolph McIntyre, Winnsboro, James B. Supple, Darnall, Biggs, Trowbridge, Supple & Cremaldi, Franklin, James J. Davidson, III, Davidson, Meaux, Sonnier & Mcelligott, Lafayette, Wendell Miller, Millican, Miller & Buisson, Jennings, James Funderburk, Duval, Funderburk, Sundbery & Lovell, Hoyma, for plaintiffs-appellants.

Marshall Brinkley, Baton Rouge, Michael R. Fontham, Paul L. Zimmering, Noel J. Darce, Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans, for defendant-appellee.

WATSON, Justice.

Plaintiffs,[1] nonprofit electric cooperatives, ask for a declaratory judgment on the constitutionality of LSA-R.S. 12:409 G.(3)(a) and (b)[2] which deal with rate fixing and elections for "Any cooperative not under the jurisdiction of Public Service Commission." Plaintiffs also ask injunctive relief against regulation by the Public Service Commission,

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1. Cajun Electric Power Cooperative, Inc. (Cajun); Southwest Louisiana Electric Membership Corporation (SLEMCO); Claiborne Electric Cooperative, Inc. (Claiborne); Jefferson Davis Electric Cooperative, Inc. (Jeff Davis); Northeast Louisiana Power Cooperatives, Inc. (Northeast); South Louisiana Electric Cooperative Association (SLECA); and Teche Electric Cooperative, Inc. (Teche).

2. LSA-R.S. 12:409 G. (3)(a) and (b) provide:

> "(3)(a) Any cooperative not under the jurisdiction of the public Service Commission, prior to any change in rates charged for electric energy, shall conduct a public hearing after giving sixty days prior written notice by mail to all cooperative members. The notice may be included in a billing notice but shall be a separate and prominent document. The notice shall contain a brief explanation of the reasons for the effect of the rate increase on consumers and inform the consumers of the availability of a complete, written explanation of the reasons for and the basis of the rate increase. Such written explanation shall be available for examination by any member or his representative at all cooperative offices during regular business hours at least sixty days prior to the hearing.
>
> "(b) At the hearing, the directors of the cooperative shall present evidence in support of the rate change and shall provide the members or their representatives an opportunity to produce evidence regarding the rate change. If the directors of the cooperative fail to implement the rate change within sixty days of the public hearing, they shall conduct another public hearing prior to implementing the rate change. The press shall be admitted to the hearing."

except as authorized by LSA-R.S. 45:123[3] and LSA-R.S. 45:1163.[4] In addition, plaintiffs petition for a declaratory judgment as to their rights under LSA-R.S. 12:401, et seq.; LSA-R.S. 45:121, et seq.; and LSA-R.S. 45:1161, et seq.

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3. The complete text of LSA-R.S. 45:123 appears as part of an appendix to this opinion.

4. LSA-R.S. 45:1163 provides:

> "A. The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities; however, no aspect of direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process shall be subject ot such regulation by the commission. In addition, a schedule of rates of an electric cooperative shall not require approval of the commission if the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, nor shall the authority of the commission extend to the service rendered by electric cooperatives except to the extent provided in R.S. 45:123 and in orders of the commission promulgated to effectuate the purpose of R.S. 45:123.
>
> "B. The commission shall exercise all necessary power and authority over any electric cooperative that, by a vote of its membership, has elected to be regulated by the commission, as provided in R.S. 12:426, for the purpose of fixing and regulating the rates charged or to be charged and services furnished by the cooperative."

They pray that these laws be decreed constitutional under the 1974 Louisiana Constitution, Art. IV, § 21(B).[5]

The trial court held that plaintiffs are public utilities and therefore within the constitutional jurisdiction of the Public Service Commission over public utilities under Art. IV, § 21(B) of the Louisiana Consitution of 1974. LSA-R.S. 45:1163 was declared unconstitutional insofar as it allows electric cooperatives to exempt themselves from the jurisdiction of the Louisiana Public Service Commission. Plaintiffs' suit was dismissed, and plaintiffs have appealed.[6]

In a separate judgment involving LSA-R.S. 45:1180 B.,[7] the trial court assessed the cooperatives 90% of the attorneys' fees and expenses certified by the secretary of the Commission and 7/13ths of the remaining 10%.

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5. LSA-Const. Art. IV, § 21(B) provides:

> "(B) Powers and Duties. The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law."

6. LSA-Const. Art. V, § 5(D).

7. LSA-R.S. 45:1180 B. provides:

> "Attorneys or special counsel may be retained by the commission to assist the economics and rate analysis division for the purpose of evaluating and reviewing matters affecting services and rates charged by public utilities to Louisiana consumers and for representing the Public Service Commission in such cases or the judicial review thereof."

Plaintiffs are rural electric cooperatives which were established under the Rural Electrification Administration (REA) as authorized by the Rural Electrification Act of 1936.[8]

Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983) decided that state regulation of electric cooperatives is not barred by the Supremacy and Commerce Clauses of the United States Constitution. Recognizing that the REA could pre-empt state regulation of rural power cooperatives, the United States Supreme Court decided that there is no express preemption. Refusing to draw a bright line between state regulation and unexercised federal power, the court applied a balancing test to find that state regulation of rates is permissible when there is only an incidental effect on interstate commerce. While a particular rate structure might unreasonably disturb the interstate market for electric power, thereby imposing an excessive burden on interstate commerce, the REA may otherwise operate within the constraints of a state regulatory system. Thus, absent compromise of an important federal interest, such as the ability of a cooperative to repay its loans, state regulation may be allowed.

Louisiana Power & L. Co. v. Louisiana Pub. Serv. Com'n, 250 La. 596, 197 So.2d 638, 643 (1967) decided that electric cooperatives were not public utilities per se because: (1) they were not in existence when Act 254 of 1936 defined public utilities; (2) they were specifically excepted from the jurisdiction and control of the Public Service Commission by LSA-R.S. 12:326; and (3) the cooperatives were not included in the definition of public utilities regulated by the Public Service Commission in Act 254 of 1936.

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8. 7 U.S.C.A. 901, et seq.

Central La. Elec. Co. v. Louisiana Pub. Serv. Com'n, 251 La. 532, 205 So.2d 389 (1967) held that the 1921 Constitution did not place all "public utilties" under the Public Service Commission. In deciding that an electric cooperative is not an "electric public utility" under that Constitution, the court noted that electric cooperatives were not in existence in 1921. The *Central* court concluded that Commission customer protection was not necessary in a cooperative operation.[9] Adding additional persuasion was a legislative exemption and the Commission's failure to attempt regulation of the cooperatives for a long period of time.

In a later *Central* opinion authored by then Justice Barham,[10] this court reaffirmed the holding that electric cooperatives were not "electric public utilities" or "other utilities" placed under the Public Service Commission by the 1921 Constitution. Therefore, the Legislature had the perogative of dictating whether they were subject to Commission jurisdiction.

Although electric cooperatives were not defined as "public utilities" in the Louisiana Constitution of 1921, that Constitution allowed the legislature to place them under the Commission's authority as "other public utilities." Hence, under the 1921 Constitution, the legislature had plenary power to place "other public utilities" under the authority of the Public Service Commission.

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9. *Greater Livingston Water Co. v. Louisiana P.S. Com'n*, 246 La. 273, 164 So.2d 325 (1964), cited with approval in this *Central* case, had noted the distinction between a utility requiring regulation for the protection of its customers and one subject to elective control.

10. *Central La. Electric Co. v. Louisiana Pub. Serv. Com'n*, 253 La. 553, 218 So.2d 592 (1969).

Nonprofit electric cooperatives have always been characterized as "Special Corporations" under LSA-R.S. 12:401 through 430, the Electric Cooperative law. They were exempted from the jurisdiction of the Public Service Commission at their inception in 1940[11] and remained exempt until 1970.[12]

In 1970, LSA-R.S. 45:121 was amended to include electric cooperatives in the definition of electric public utilities and LSA-R.S. 12:426 was amended to place electric cooperatives under the jurisdiction of the Public Service Commission. Thus, when the 1974 Constitution was adopted, the Public Service Commission had been exercising statutory control over electric cooperatives for four years. *Dixie Electric Membership Cooperative v. Louisiana Public Service Commission*, 509 So.2d 1002 (La.1987).

The Louisiana Constitution of 1974 went into effect at midnight on December 31, 1974 and delineated the jurisdiction of the Public Service Commission in Art. IV, § 21(B), which states that "the commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law." Although electric cooperatives were statutory public utilities when the 1974 Constitution was adopted. *Dixie* did not decide whether they were "public utilities" under the 1974 Constitution. In fact, the majority in *Dixie* was careful to note that the decision was ". . . a

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11. LSA-R.S. 12:426 then provided:

> "Cooperatives transacting business in this State pursuant to this Act shall be exempt in all respects from the jurisdiction and control of the Public Service Commission of the State." 1940 La. Acts 266, § 25.

12. 1970 La. Acts 34, effective July 29, 1970.

resolution of the legal dispute which does not require a constitutional interpretation."[13]

The 1974 constitutional debates indicate that the delegates did not intend to change the Commission's authority. The question then becomes whether the 1974 Constitution placed electric cooperatives under the Public Service Commission as "public utilities" or whether statutory implementation by the legislature was required to give the Commission "other regulatory authority as provided by law" over the cooperatives.[14] The Louisiana legislature adopted the latter interpretation and decided in 1978[15] to exempt the cooperatives from Commission control of rates and service.[16] In 1983, electric cooperatives were given the option of Commission regulation when a majority of the members voted in favor of Commission jurisdiction.[17]

Nonprofit rural electric cooperatives are not public utilities in the broad sense of the term. The legislature recognized this

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13. 509 So.2d 1002 at 1007.

14. LSA-Const. 1974, Art. IV, § 21(B) supra.

15. 1978 La. Acts 77, effective September 8, 1978.

16. An exception was made for extension and construction of facilities. See LSA-R.S. 45:1163 prior to its 1984 amendment. A caveat required rate approval by the cooperative's board of directors and the federal government.

17. 1983 La. Acts 636, effective January 1, 1984.

in 1975 when it enacted LSA-R.S. 33:4170[18] which allows municipalities owning revenue producting electrical utilities[19] to contract with electric public utility companies, other municipalities owning utilities *or* with Rural Electric Association Cooperatives.

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18. LSA-R.S. 33:4170 states:

> "Any one or more municipalities owning and operating a revenue producing electrical utility as defined in R.S. 33:4161 of this Part, is hereby authorized to engage with one or more electric public utility companies as defined in R.S. 45:121, or with any one or more other municipalities owning and operating a revenue producing electrical utility, as aforesaid, or with a Rural Electric Association Cooperative on intrastate or interstate basis, in the financing, construction, maintenance, and operation of joint electric power generation and transmission facilities as owners or otherwise. * * * " Added by 1975 La. Acts 425, § 1.

19. A "Revenue producing public utility" is defined by LSA-R.S. 33:4161 as follows:

> "For purposes of this Part, 'revenue producing public utility' means any revenue producing business or organization which regularly supplies the public with a commody or service, including electricity, gas, water, ice, ferries, wharehoses, docks, wharves, terminals, airports, transportation, telephone, telegraph, radio, television, drainage, sewerage, garbage disposal, and other like services: or any project or undertaking, including public lands and improvements thereon, owned and operated by a municipal corporation or parish or other political subdivision or taxing district authorized to issue bonds under authority of Section XIV of Article 14 of the Constitution of Louisiana of 1921, from the conduct and operation of which revenue can be derived."

Between September 8, 1978, and September 3, 1987, the Public Service Commission deferred to the legislative intent expressed in LSA-R.S. 45:1163 and other statutes. The Commission then decided to assert authority over the electric cooperatives. An order directing rate and service regulation of the electric cooperatives by the Public Service Commission was issued on September 3, 1987.[20] This suit followed on September 30, 1987. Prior to September 3, the Commission had acceded to the legislation allowing electric cooperatives to choose or refuse Commission regulation.

While rural electric cooperatives are a type of public utility in that they furnish a necessary public service, they are instrumentalities of the United States created by federal law and "something more than public utilities."[21] Being federal creations, rural electric cooperatives should be considered in the context of federal law. REA cooperatives are not "public utilities" under the regulation of the Federal Power Act, even though they "seem to fall within the ambit" of that phrase.[22]

"Though REA regulation and supervision of cooperatives are in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are

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20. Tr. 35, 36.

21. *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 at 677 (5th Cir. 1968), cert. den. 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465.

22. *Salt River Project Agr. Dist. v. Federal Power Commission*, 391 F.2d 470 at 474 (D.C.Cir.1968), cert. den. 393 U.S. 857, 89 S.Ct. 104, 21 L.Ed.2d 126.

effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are nonprofit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit."[23]

Between 1978 and 1987, the Louisiana Public Service Commission refrained from regulating the electric cooperatives, indicating acquiescence in the Legislature's interpretation of the Commission's authority. *Central La. Elec. Co. v. Louisiana Pub. Serv. Com'n*, 251 La. 532, 205 So.2d 389 (1967).

Although electric cooperatives have many of the characteristics of public utilities, they are special creations of federal law which come within the regulatory authority of the Public Service Commission only "according to law". Being self-regulated, democratic, and nonprofit, they are not the type of utility which necessarily requires Commission regulation. *Salt River Project Agr. Dist. v. Federal Power Commission*, 391 F.2d 470 (D.C.Cir.1968), cert. den. 393 U.S. 857, 89 S.Ct. 104, 21 L.Ed.2d 126.

Approximately one-half of the states impose state regulation on REAs in addition to their federal regulation. This indicates that the necessity of state regulation is a debatable proposition. According to the testimony and exhibits, federal regulation is extensive.

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23. *Salt River Project Agr. Dist. v. Federal Power Commission*, 391 F.2d 470 at 473.

The drafters of the 1974 Louisiana Constitution intended to preserve the existing law whereby public utilities were automatically under the jurisdiction of the Public Service Commission and other utilities, such as the REAs, could be placed under the control of the Public Service Commission at the discretion of the Legislature. The debates indicate no substantive change was intended. The 1974 Constitution allows the Legislature to give the Public Service Commission regulatory authority in addition to that constitutionally mandated over common carriers and public utilities. This additional authority parallels that granted by the 1921 Constitution. Hence, electric cooperatives can be regulated by the Public Service Commission if authority is granted or, in this instance, withheld, by the Legislature. This is the most reasonable interpretation of the constitutional language, and it validates the many legislative acts potentially affected by this litigation.[24] Legislative enactments have a presumption of constitutionality. *Dir. of La. Recovery Dist. v. Taxpayers*, 529 So.2d 384 (La.1988).

Since nonprofit electric cooperatives are not public utilities as a matter of law, the legislature has authority to exempt those cooperatives from the authority of the Public Service Commission. The trial court erred in dismissing plaintiffs' suit for a declaratory judgment and injunctive relief and in holding that LSA-R.S. 45:1163 is unconstitutional. Plaintiffs have asked for declaratory judgments as to various statutes pertaining to them. The holding that the Louisiana Public Service Commission may regulate electric cooperatives only as authorized by the Legislature answers the fundamental question as to the Commission's constitutional authority and makes consideration of the separate

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24 See, for example: 1975 La. Acts 328; 1976 La. Acts 468; 1982 La. Acts 560, 562, 566; 1984 La. Acts 202.

provisions unnecessary. Likewise, the issuance of an injunction does not appear to be required, although plaintiffs' rights are reserved in this regard.

Not being "public utilities", plaintiffs are not liable for the attorneys' fees and expenses assessed under LSA-R.S. 45:1180.B.

For the foregoing reasons, the judgments of the trial court are reversed.

REVERSED.

COLE, J., concurs to assign additional reasons.

DENNIS and CALOGERO, JJ., dissent with reasons.

LEMMON, J., dissents and assigns reasons.

APPENDIX

A. (1) No electric public utility shall construct or extend its facilities or furnish or offer to furnish electric service to any point of connection which at the time of the proposed construction, extension, or service is served by, or which is not being served but is located within three hundred feet of an electric line of another electric public utility, except with the consent in writing of such other electric public utility. However, nothing contained herein shall preclude:

(a) Any electric public utility from extending service to an applicant for service at an unserved point of connection located within three hundred feet of an existing electric line of such electric public utility, unless:

(i) Such line was not in operation on April 1, 1970 and

(ii) The point of connection is located within three hundred feet of an existing electric line of another electric public utility, which line was in operation on said date, or

(b) Any electric public utility from extending service to its

own property or to another electric public utility for resale.

(2) Further, any consumer receiving electric service from a public utility that is subject to the jurisdiction of the Louisiana Public Service Commission who feels aggrieved with the electric service being received by him may apply to the Louisiana Public Service Commission for an order directed to his present supplier to show cause why the consumer should not be released from said supplier, and if the commission shall find that the service rendered to such consumer is inadequate and will not be rendered adequate within a reasonable time the release shall be granted.

B. As used in this Section, 'electric line' means a line constructed and operated for the transmission or distribution or transmission and distribution of electricity, and that was not originally constructed for the principal purpose of preempting territory.

C. Nothing in this Section shall either prohibit or mandate the performance by any parish, municipality, political subdivision, or combination thereof, of any agreement for the sale of electric power executed prior to January 1, 1984, or any renewal of such agreement. Nothing in this Section shall prohibit or mandate in the performance of such agreement the furnishing of service to persons and business organizations being served by another electric public utility.

D. Notwithstanding any other provision of this Section, any municipally-owned or operated utility may furnish or offer to furnish electric service to any point of connection for a retail consumer who is not being served by another utility without the necessity of obtaining the written consent of any other utility if such point of connection is within one mile of such municipality's corporate limits, as such corporate limits of a municipality with more than fifty megawatts of peak load exist on the effective date of this Section and on every third anniversary date of the effective date of this Section, and as such corporate limits of all other municipalities which have fifty megawatts or less of peak load now or in the future exist from time to time.

E. Nothing in R.S. 45:121, 45:123, 45:-1161, 45:1175, or R.S. 12:426 shall alter the rights or authority of municipalities with respect to franchises within the corporate limits of a municipality as such limits exist from time to time.

COLE, Justice concurring.

I am in full agreement with the holding and rationale of Justice Watson's opinion. I write separately only to stress the substantial weight of authority which supports his conclusions.

At the outset, it should be noted the Public Service Commission (P.S.C.) asks us to "discover" a constitutional limitation on the legislature's otherwise plenary power. As we

observed in *Guillory v. Department of Transportation and Development*: "It is a fundamental principle of judicial interpretation of state constitutional law that the legislature is supreme except when specifically restricted by the Constitution." 450 So.2d 1305 at 1308 (La.1984). (citations omitted). In addition, as we observed in *Board of Directors of Louisiana Recovery District v. All Taxpayers, Property Owners and Citizens of the State of Louisiana*, 529 So.2d 384 (La.1988):

> Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the Legislature in adopting a statute has acted within its constitutional powers. . . . The party attacking such a statute has the burden of showing *clearly* that the legislation is invalid or unconstitutional, and any doubt as to the legislation's constitutionality must be resolved in its favor . . . . *In an attack upon a legislative act as falling within an exception to the Legislature's otherwise plenary power, it is not enough to show that the constitutionality is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact the statute.*

Id. at 387-388 (citations omitted) (emphasis added). The P.S.C. has clearly failed to meet this heavy burden.

From the turbulent history of the debate in the Constitutional Convention surrounding Article IV, § 21(B), one consistent theme emerges: the desire of the delegates

to maintain the constitutional status quo. Delegate (now Commissioner) Lambert, speaking in opposition to the Arnette amendment which would delete the phrase "as provided by law," said:

> I ask you for a number of reasons to reject this amendment.
>
> The first reason being, the committee worked hard in this particular area in an effort not to make any substantive change basically in that provision. The reason for that was that apparently it had worked fairly well in the past. We didn't see any particular reason to tamper with it.

IX *Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts (Records)* at 3008 (105th Days Proceedings; December 20, 1973). In an exchange with Arnette, Lambert added: "What the Committee was trying to do was retain the substantive law in that article." *Id.*

Even more instructive are several remarks of Delegate Juneau, whose amendment became the current Article IV, § 21(B). In explaining his amendment, he noted: "That is in basis what the present law is. . . . IX *Records* at 3346 (117th Days Proceedings; January 14, 1974); "What I'm saying, Woody, is I think that the law ought to be the same as it is today . . . ." *Id.* at 3347; "[T]he amendment which I proposed is not to make any change whatsoever in the present authority and jurisdiction of the Public Service Commission. Whatever act you may have passed in the legislature relating to the Public Service Commission could be passed in 1975, 1976 or '77. . . . If you have authority in the legislature to pass an act relating to the Public Service

Commission, whatever those acts are today, I think you would have the same authority under this amendment to pass that type of legislation." *Id.* "[I]f you want to leave the law as it is today, then I ask you to adopt the amendment." *Id.* at 3349.[1]

The extant balance of power between the P.S.C. and the Legislature which the delegates sought to preserve had been clearly defined, insofar as electric cooperatives were concerned, by our prior decisions under the analogous provisions of the 1921 constitution.[2] In our decision in *Central Louisiana Electric Co. v. Louisiana Public Service Comm'n*, 251 La. 532, 205 So.2d 389 (1967), we held electric cooperatives were *not* subject to P.S.C. regulation under its constitutional grant of authority. *Accord, Central Louisiana Electric Co. v. Louisiana Comm'n*, 253 La. 553, 218 So.2d 592 (1969). Nor was the decision in *Central Louisiana Electric* in any way anomalous. In a line of authority stretching back to 1927,[3] this Court consistently refused to limit the Legislature's power to define the regulatory duties of the P.S.C. outside its carefully circumscribed constitutional authority. The prior constitutional provision, the effect of which the delegates sought to adopt, cannot reasonably be said to have been separated from its attendant jurisprudential accretions. Nothing in the pertinent history

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1. The delegates' other concern, i.e., that the Legislature could strip away all power from the P.S.C., is inapposite here. Since our ruling simply affirms the P.S.C.'s regulatory jurisdiction as it existed, there has been no diminution of its authority. In other words, the statutes we here uphold do not take any authority from the P.S.C. which it ever actually had.

2. La. Const., Art. VI, § 4.

3. *New Orleans Pontchartrain Bridge Co. v. Louisiana Public Service Comm'n*, 162 La. 874, 111 So. 265 (1927); *see also Talbot v. Louisiana Highway Comm'n*, 159 La. 909, 106 So. 377 (1925).

supports this conclusion.[4] In light of this, one is obliged to conclude Article IV, § 21(B) also excludes electrical cooperatives from the P.S.C.'s constitutionally mandated regulatory jurisdiction. Any extension of the P.S.C.'s authority beyond the constitutional grant can, and should, come only from the Legislature.[5]

Against the weight of constitutional history, statutory and jurisprudential law, and the strong presumption of constitutionality of Legislative enactments, the P.S.C. offers only its own interpretation of Article IV, § 21, a scrap of dictum in *Dixie Electric*, and its own notion of how the public welfare is best served which differs from that of the Legislature. This is plainly insufficient to show by "clear and convincing evidence" the acts challenged here are unconstitutional. Absent such a showing, the statutes at issue here must be upheld.

Accordingly, I respectfully concur.

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4. The defendant cites no authority, and I could find none, for the notion the delegates sought to do away with the prior jurisprudence limiting P.S.C. authority under the constitution. Indeed, there was no clear statement by any delegate suggesting Art. IV, § 21(B) would or should alter the existing scope of P.S.C. authority under the old constitution.

5. See Comment, Public Utilities-Jurisdiction of Public Service Commission over Electric Cooperatives, 42 Tulane L.Rev. 434, 442-443 (1968).

Just such an extention was effected by the Legislature between 1970 and 1978. *See* 1970 La. Acts 34 and 1978 La. Acts 77. Neither this Court nor the P.S.C. is empowered to pass on the wisdom of the decision to re-exempt electric cooperatives from P.S.C. control. One may reasonably conclude, however, the decision of the Legislature in 1978 reflected a considered policy determination recognizing the unique structure and function of rural electrical cooperatives.

DENNIS, Justice, dissenting.

I respectfully dissent.

The Constitutional Convention debates reflect disagreement among a handful of delegates, but the constitution provision itself signifies an unmistakable intention to vest the Public Service Commission with the constitutional power and the duty to regulate all "common carriers and public utilities" and the ability to receive regulatory authority over other entities as provided by law. The 1974 Constitution provision represents a marked shift in philosophy from the 1921 Constitution's public service commission section. Under the 1921 Constitution, the Commission was granted the constitutional power to regulate only the types of utilities specifically named (e.g., street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works . . . .). The Legislature, on the other hand, was accorded the right to determine which other utilities should be placed under the Commission's authority. See *Cent. La. Elec. v. Louisiana Public Service Commission*, 251 La. 532, 205 So.2d 389 (1967).

The 1974 Constitution, by stating that the "Commission shall regulate all common carriers and public utilities and have such other regualtory authority as provided by law" adopted the prevailing viewpoint in public utilities law. The general rule is that, in the absence of a constitutional provision declaring particular businesses to be public utilities, the question of whether or not a given industry or service is a public utility depends on the nature of the business or service rendered. *State Public Com. v. Monarch Refrigerating Co.*, 267 Ill. 528, 108 N.E. 716 (1915); *Aberdeen Cable TV Service v. Aberdeen*, 85 S.D. 57, 176 N.W.2d 738 (1970), cert. denied 400 U.S. 991, 91 S.Ct. 455, 27 L.Ed.2d 439.

Accordingly, the question whether a particular company or service is a public utility is a judicial one which must be determined by a court of competent jurisdiction. *Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co.*, 148 Ark. 260, 230 S.W. 897 (1921); *Aberdeen Cable TV Service, Inc. v. Aberdeen, supra; Inland Empire Rural Electrification v. Dept. Pub. Serv. Wash*, 199 Wash. 527, 92 P.2d 258 (1939); *Natatorium Co. v. Erb*, 34 Idaho 209, 200 P. 348 (1921); *Clarksburg Light Co. v. Pub. Serv. Com.*, 84 W.Va. 638, 100 S.E. 551 (1919).

Thus the Legislature may not deprive the Public Service Commission of its constitutional power to regulate any public utility, but it may legislatively provide for or repeal the Commission's power to regulate other businesses or enterprises. The mere fact that an industry is affected with the public interest and may be regulated by the Legislature under the state's police power does not give that enterprise the character of a public utility. *U.S. v. Cronenweth Dairy Co.*, 102 F.Supp. 364 (W.D.Pa.1951); *Commonwealth, Pub. U. Com. v. WVCH Communications, Inc.*, 23 P.Commw.Ct. 292, 351 A.2d 328 (1976).

In short, it cannot be determined in a simplistic way whether the 1974 Constitution enhanced or diminished the power of the Public Service Commission. If the business or enterprise in question is determined by the courts to be a public utility because of its inherent characteristics, the Commission has the constitutional power to regulate it. If the business is not by nature a public utility, the Commission does not have such constitutional power, even if the enterprise is of a type listed in the 1921 Constitution, but the enterprise may be placed under the Commission's regulatory authority by law if it is a business affected with the public interest.

The majority opinion seems to base its decision on a confused mixture of two ideas: (1) The 1974 Constitution perpetuated the classification of electric cooperatives as businesses which are not by nature public utilities but enterprises which may be statutorily subjected to regulation by the Commission; and (2) The 1974 Constitution did not perpetuate this classification but electric cooperatives are held by this court *not* to be public utilities and therefore not subject to the constitutional regulatory power of the Commission. I disagree strongly with the first idea because it is at odds with the clear wording of the Constitution and denigrates the Constitution by treating it as a sort of statutory law to be interpreted in pari materia with other legislative acts and subservient to legislative construction. As to the second idea, I am uncertain. Whether the electric cooperatives before the court are by nature public utilities as a matter of constitutional law is a complex question dependent upon the nature of each individual business. This question has not been addressed squarely and fully by the court or the parties and I am not certain that the record is sufficiently complete to afford a definitive answer. Consequently, although I am unable to say what the result in this case should be, I necessarily must respectfully dissent.

CALOGERO, Justice, dissenting.

At the time that the Louisiana Constitution of 1974 was adopted, electric cooperatives were statutorily defined as public utilities. La. R.S. 45:121 (1970); La. R.S. 12:246 (1970); *Dixie Electric Membership Cooperative v. Louisiana Public Service Commission*, 509 So.2d 1002, 1005 (La. 1987).

Article IV, Section 21(B) of the 1974 Constitution gives the Louisiana Public Service Commission exclusive authority to regulate all "public utilities." Because electric cooperatives

were statutorialy defined as public utilities at the time Art. IV. Sect. 21(B) was adopted, the only logical conclusion is that such cooperatives are covered by the constitutional provision and are subject to the regulatory jurisdiction of the Commission. *See Dixie Electric Membership Coop., supra*, 509 So.2d at 1007.

There is no contrary indication in the constitutional convention debates regarding Art. IV, Sec. 21(B). In fact, this constitutional provision was opposed by some delegates to the constitutional convention on the ground that it gave the Public Service Commission exclusive regulatory control over all public utilities and common carriers, and did not provide the Legislature with the discretionary power to modify the scope of the Commission's regulatory authority. *See* Rec. of 1973 Cons. Conv., Tr., Vol IX, p. 3346 (remarks of Mr. Juneau); p. 3347 (remarks of Messers. Juneau & Jenkins); p. 3349 (remarks of Messers. Derbes, Jenkins & DeBlieux). The constitutional provision passed in spite of this opposition. It is thus reasonable to conclude that the delegates understood that this provision would prohibit the Legislature from exempting any class or category of public utility from the Commission's jurisdiction. And, again, electric cooperatives were statutorily classified as public utilities at the time.

Therefore, I would affirm the trial court's ruling that La. R.S. 45:1163 is unconstitutional, to the extent that it attempts to divest the Commission of regulatory jurisdiction over the cooperatives.

For the foregoing reasons, I respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 88-CA-1719

CAJUN ELECTRIC POWER COOPERATIVE, INC. et al.

Versus

LOUISIANA PUBLIC SERVICE COMMISSION

MAY 3, 1989
(stamp)

ON REHEARING

DIXON, Chief Justice

Rehearing was granted to reconsider whether article IV, § 21(B) of the state constitution, by explicitly granting to the commission the full authority over "all public utilities," removes the ability of the legislature to alter the commission's jurisdiction over any business defined as a public utility at the time the 1974 Constitution was adopted. We conclude that it does. Insofar as R.S. 45:1163 is inconsistent with this plenary authority, it is unconstitutional.

THE COMMISSION'S CONSTITUTIONAL JURISDICTION

Article IV, § 21(B) provides that the public service commission "shall regulate *all* common carriers and public utilities and have such other regulatory authority as provided by law." (Emphasis added). Our code provides that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as

written and no further interpretation may be made in search of the intent of the legislature." C.C. 9 (previously article 13 (1870)). The code further provides that "[t]he words of a law must be given their generally prevailing meaning." Id. article 11 (previously articles 14 and 15 (1870)). This court, when interpreting our constitution, should give effect to language that is plain and unambiguous. Bank of New Orleans and Trust Co. v. Seavey, 383 So.2d 354 (La. 1980), on remand, 399 So.2d 642 (La. App. 4th Cir. 1981), writ denied, 401 So.2d 1196 (La. 1981). Explicit constitutional provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning. State through Department of Highways v. Bradford, 242 La. 1095, 141 So.2d 378 (1962).

The cooperatives contend again, as they did in their original brief, that the words of article IV, § 21(B) are ambiguous. "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." C.C. 10. If the words of a constitution are indeed ambiguous, a court may resort to the transcripts of the constitutional convention proceedings as an aid to find the purpose, intent, and meaning of those words. New Orleans Firefighters Association v. Civil Service Commission of City of New Orleans, 422 So.2d 402 (La. 1982).

The majority in our original opinion did not address whether article IV, § 21(B) is ambiguous, agreeing instead with the cooperatives' contention that the drafters did not intend to change the jurisdiction of the commission in the new constitution. Article IV, § 21(B), however, is unambiguous. It clearly states that the commission shall have jurisdiction over *all* common carriers and public utiltities and have such other regulatory authority as provided by law. The cooperatives' contention that the phrase "as provided by law" modifies the commission's jurisdiction over common

carriers and public utilities would result in a solecism. The adverbial phrase, "as provided by law," defines the conditions under which the commission shall have the "other regulatory authority" that the legislature may choose to grant.[1]

Since the provision is unambiguous, this court ought not base its decision on words used in argument at the convention proceedings but should instead rely on the product that the convention ultimately produced. City of New Orleans v. Scramuzza, 507 So.2d 215 (La. 1987). The language that the voters of this state adopted granted, in mandatory language, constitutional jurisdiction to the commission over all common carriers and public utilities.[2]

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1. Adverbial clauses, although usually available for various stylistic placements in a sentence, are more restricted when, as here, a sentence contains more than one verb. In such sentences, the rule of propinquity dictates that the adverbial clause follow the verb modified. See Buckler, American College Handbook of English Fundamentals §§ 39-39a. pp. 253-258 (2d ed. 1965).

2. Even if resort to the convention proceedings were appropriate in this case, those proceedings would only affirm the clear language of the provision. Justice Cole in his concurrence to our original opinion correctly pointed out that the majority of the delegates wanted to maintain the status quo insofar as the commission's jurisdiction was concerned. A careful reading of the transcripts reveals, however, that the "status quo" was not the dual approach to the commission's jurisdiction under the 1921 Constitution. Instead, the "status quo" the delegates sought to protect was the commission's plenary constitutional jurisdiction over *all* public utilities.

Article IV, § 21(B) as originally drafted provided that the commission would regulate "all common carriers and public utilities as provided by law." Delegate Arnette proposed an amendment that would have deleted "as provided by law" in order to preserve the commission's jurisdiction:

The legislature cannot by statute modify that jurisdiction. City of Baton Rouge v. Short, 345 So.2d 37 (La. 1977).

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2. (Continued)

"[T]here is definite constitutional jurisdiction in the old 1921 Constitution. Under the new proposal, there is none whatsoever. The Legislature must provide any jurisdiction that the Public Service Commission has by virtue of these four words." Louisiana Constitutional Convention Records Commission. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. IX, p. 3008 (1977).

Delegate Arnette's amendment was defeated. But several days later, Delegate Juneau was still concerned that the section as proposed had indeed changed the law and stripped the commission of constitutional jurisdiction. He proposed as a second amendment the language that became § 21(B).

"[I]f we're going to put into the constitution a commission which will regulate common carriers and public utilities, you have, in effect, destroyed the constitutionality of that provision by in turn saying, 'as provided by law.' It makes sense that by a mere legislative act, you could strip away the authority of the Public Service Commission to regulate common carriers and public utilities. I might further add that if we were to leave this language alone, you are making a drastic change in the current law. . . . I think the intent was, of this convention, to put the authority to regulate common carriers and public utilities in the exclusive jurisdiction of the Public Service Commission." Id. at 3346.

Juneau then offered his amendment to preclude "in the future . . . the legislature completely stripping the Public Service Commission of duties that I think we fully intend to give them." Id.

Both Jenkins and Delegate De Blieux spoke against the Juneau amendment, emphasizing that the amendment limited the power of the legislature to control the commission's regulation of common carriers and public utilities. Id. at 3349. Delegate Derbes also emphasized in his objection to the amendment that it prevented the legislature from defining the term "public utilities." Without the Juneau amendment, Derbes contended, the legislature retained control over the definition

PUBLIC UTILITIES

If electric cooperatives are public utilities, then the commission has regulatory jurisdiction over them. In 1970, the legislature amended R.S. 45:121 to include electric cooperatives on the list of businesses classified as public utilities. 1970 La. Acts No. 34, § 1. Thus, at the time the 1974 constitution was drafted and adopted, electric cooperatives were statutorily defined as public utilities and were under the jurisdiction of the commission. See R.S. 12:426; Dixie Electric Membership Cooperative v. Louisiana Public Service Commission, 509 So.2d 1002 (La. 1987). Electric cooperatives remain statutorily defined as public utilities. R.S. 45:121.[3]

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2. (Continued)

of common carriers and public utilities. But with the amendment, the jurisdiction of the commission could not be modified by legislative act: "If you [define public utility or common carrier] by judicial interpretation you give the Public Service Commission jurisdiction, and there's no way we can get something that's been given such jurisdiction away . . . even though we might pass a legislative act doing so, it could not modify this constitution once the courts so declared it." Id. at 3348.

Nevertheless, the amendment so restricting the legislature was adopted by the delegates and later by the people.

3. Although we base our decision in this case on the existence since 1970 of a legislative definition of electric cooperatives as public utilities, we do recognize that an approach often used by economists and by the highest courts in other states in defining "public utility" focuses not on legislative definition but rather upon the nature of the service rendered that makes regulation appropriate. Similarly, this court, in Gulf States Utilities Co. v. Louisiana Public Service Commission, 222 La. 132, 145, 62 So.2d 250, 254 (1954), determined that an investigation of the characteristics of a business is essential to determine "whether a particular business is or has become a public utility . . . ."

Even though they are statutorily defined as being public utilities, the cooperatives contend that they are not the *kind* of public utility for which regulation by the commission was intended. Indeed, the constitution does restrict the

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3. (Continued)

The concept of a public utility is a legal one that has developed from the conflict between the economic, social, and political forces seeking to control monopolies and those businesses regularly providing the essential services and commodities that are most efficiently produced in a monopoly setting. See Bonbright, Principles of Public Utility Regulation 8 (1961); see also generally Phillips, The Regulation of Public Utilities ch. 1 (1988); Barnes, the Economics of Public Utility Regulation 42 (1942):

"Public utilities are distinguished from other businesses by the formal obligations to the public which are imposed upon such companies. Utility enterprises must serve all who apply for the service at reasonable and non-discriminatory prices. They must be prepared at all times to render a service that is adequate both in quality and in quantity, and moreover the services must be immediately available when consumers demand service. In the absence of an alternative, the consumer must take service from the only available utility, and it is, therefore, appropriate that the company should be under a legal obligation to provide the service at a reasonable price."

Even if the legislature had not defined electric cooperatives as public utilities, under this analysis, we believe the outcome in this case would be the same. The record reflects that the plaintiffs are electric cooperatives with a monopoly in their respective service areas to market electricity, an essential product. As a condition of that monopoly, they must provide quantity and quality service on demand to all who are willing to become members of the cooperative. In return, the cooperatives enjoy protection from competition because other utilities cannot intrude on their service areas. See R.S. 45:123. Without such protections, the economics of scale and technology, coupled with the extensive capital outlays required for start-up alone, would make it impossible for the cooperatives to fulfill their commitments. See generally Schmalensee, The Control of Natural Monopolies 27-43 (1979).

commission's regulatory jurisdiction over one type of public utility, that being a utility owned, operated, or regulated by a political subdivision's governing body. La. Const. Art. 4, § 21(C). But neither the plain language of this constitution nor the record of the framers' debates indicates that the commission's jurisdiction over electric cooperatives should be curtailed. As noted above, the legislature defined cooperatives as public utilities at the time of the drafting and the adoption of the 1974 Constitution. Had the framers intended to except another kind of public utility from the commission's jurisdiction, they could have done so.[4]

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4. Since the 1974 Constitution does not make a distinction between cooperatives and other "types" of utilities, the question of whether they should be regulated is not before this court. Because our original opinion relied on this contention, however, we do recognize the theoretical underpinnings of the cooperatives' argument. The theory that electric cooperatives are not the kind of utilities that should be regulated has its genesis in Garkane Power Co. v. Public Service Commission, 98 Utah 466, 100 P.2d 571 (1940). In that case, the Utah Supreme Court determined that there was no conflict between consumer and producer interests as far as cooperatives were concerned. Such a conflict can arise in situations where rates are so high that many who need service can't afford it, or so low that investors do not get a fair rate of return on their investment and, consequently, do not reinvest to secure adequate service.

The court reasoned that consumer and producer interests were one and the same: 'If rates are too high, the surplus collected is returned to the consumers pro rata. If rates are too low the consumers must accept curtailed service or provide financial contribution to the Corporation." Id. at 471, 100 P.2d at 573.

Although this reasoning was approved in Salt River Project Agricultural Improvement & Power District v. Federal Power Commission, 391 F.2d 470, 473 (D.C. Cir. 1967), cert. denied, sub nom Arkansas Valley G&T, Inc. v. Federal Power Commission, 393 U.S. 857 (1968), the United States Supreme Court cast doubt upon the continued validity of that rationale in Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 375 (1983). In affirming

In addition, the cooperatives' argument that they are not the kind of utilities intended to be subject to regulation is undercut by the very statute they seek to have upheld as constitutional. R.S. 45:1163(B) allows electric cooperatives to choose to have rates and services regulated by the commission under the provisions of R.S. 12:426. If the structure and function of these cooperatives were such that regulation were unnecessary, it would be illogical for the legislature to have exempted them from regulation in R.S. 45:1163(A) and yet provided for them to choose to be regulated in R.S. 45:1163(B) and R.S. 12:426.

PREEMPTION OF STATE REGULATION BY THE REA

In 1935, President Roosevelt established the Rural Electrification Administration (REA)[5] in order to provide

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4. (Continued)

the jurisdiction asserted by the commission over the cooperatives, the court recognized that the cooperatives' self-regulating method of ownership did not prevent them from engaging in "economically inefficient behavior." Id. at 394 (citing R. Schmalensee, The Control of Natural Monopolies 90-93 (1970)). The comment by Schmalensee to which the court referred noted that "[c]ontrol by a board of amateurs from among the cooperative's membership . . . would likely encounter difficulties of ensuring that sufficient skills and resources were applied to the control function. If the enterprise is at all complex, managerial sloth . . . is difficult for outsiders to detect. Yet, under cooperative ownership, it, along with politically motivated pricing, seems a principal danger." Schmalensee at 92.

Accordingly, the Court declined to second-guess the state's judgment that some degree of oversight was needed. In the case at bar, the drafters of the constitution did not remove cooperatives from the commission's jurisdiction when the constitution was drafted. We, too, decline to second-guess their judgment.

5. Executive Order No. 7037 (issued May 11, 1935).

government loans at low interest rates to encourage electric service development in rural areas. As the Supreme Court has noted, the REA is a "lending agency rather than a classic public utility regulatory body . . . ." Arkansas Electric Cooperative Corporation, 461 U.S. at 386. As such, it performs its role within state regulatory schemes. Id. Accordingly, state rate regulation of REA-financed cooperatives is not preempted by the Rural Electrification Act. Id. at 385.

ATTORNEYS FEES

Although the author of this opinion would decide the attorneys fees issue in favor of the commission,[6] the majority

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6.

The author of this opinion expresses the following view on the attorney fee issue.

Since the cooperatives are public utilities under the plenary jurisdiction of the commission, the commission may certify to them the expenses it incurs in matters affecting the services they offer and the rates they charge. Under the provisions of R.S. 45:1163.3, the commission has the power to hire special counsel to assist the economics and rate analysis division "in making an examination of the affairs of any . . . public utilities business . . . concerning matters *affecting services and rates* . . . or for representing the Public Service Commission in [these matters] or the judicial review thereof." (Emphasis added). R.S. 45:1163.3(A). Section B empowers the commission to retain attorneys to assist the division if the division's own staff cannot or is insufficient to handle matters affecting services and rates.

R.S. 45:1180(A) allows the commission to certify to the public utility being examined the expenses incurred by the commission in its examination of that business' affairs concerning matters affecting services and rates. Section B allows the commission to retain special counsel to assist in the evaluation and review of matters affecting services and rates and to represent the commission in judicial review proceedings.

has determined otherwise. The other justices of the court, three of whom subscribe fully to this opinion, and three of

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6. (Continued)

R.S. 45:1181(A) restricts the commission's employment of special counsel to "necessary" attorneys and requires that the compensation paid be "reasonable and commensurate with the value of the services performed." Section B allows the business being examined to challenge by rule the fees certified to it by the commission within fifteen days of their certification.

The record in this case reflects that on November 23, 1987, special counsel for the commission presented its statement for $43,500.00 in professional services rendered and $1,928.75 in costs incurred in this matter to the commission. On January 8, 1988, the commission secretary certified pro rata those expenses to the seven plaintiffs in this suit, pursuant to the terms of R.S. 45:1180 and 1181. The plaintiffs then challenged the fees certified by a timely filed rule, contending that the certification of the fees was arbitrary, unreasonable, and unnecessary under §§ 1180 and 1181 because the fees were not incurred by the commission in a matter affecting service or rates. Instead, the cooperatives argued that the commission incurred the fees and expenses in defense of the plaintiffs' "Joint Petition for Declaratory Judgment and Relief," a proceeding they characterized as a jurisdictional matter rather than one affecting services and rates.

In support of their position, the cooperatives point to this court's decision in South Central Bell Telephone Co. v. Louisiana Public Service Commission, 412 So.2d 1069 (La. 1982), holding that the commission could not certify to a utility the expenses incurred by special counsel in its intervention in a case only indirectly affecting the rates charged consumers in Louisiana. At that time, however, R.S. 45:1180 restricted the certification of special counsel expenses to those incurred "for the purpose of evaluating and reviewing proposed rate increases and for representing the Public Service Commission in rate making cases or judicial review thereof." In 1985, the legislature amended § 1180 to provide for the certification of all expenses incurred by the commission in its examination of a public utility concerning *matters affecting* services and rates charged. 1985 La. Acts 561, § 1. In the same act, the legislature added § 1163.3, establishing the

whom dissent on the jurisdictional issue but concur in the denial of the commission's claim for attorneys fees,

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6. (Continued)

economics and rate analysis division and empowering the commission to retain special counsel to assist it in *matters affecting* services and rates. 1985 La. Acts 561, § 2.

Under the broader terms of §§ 1180 and 1163.3, if the commission incurred the professional fees and expenses certified to the plaintiffs in a *matter affecting* services and rates, those fees and expenses are properly charged to the cooperatives, which are the public utilities being examined. The case now before this court began as a "Joint Petition for Declaratory Judgment and Injunctive Relief" filed by the plaintiffs in response to the commission's Special Order 8-87. In that order, the commission notified the seven plaintiff cooperatives that it had unanimously decided to assume jurisdiction over them pursuant to its constitutional authority. The order further directed the commission's staff and legal counsel to institute proceedings to examine the rates charged and the services rendered by the cooperatives. The commission's intended proceeding, thus, was a *matter affecting* services rendered and rates charged. The cooperatives' petition for declaratory and injunctive relief interrupted this proceeding to seek judicial review of a *matter affecting* services and rates. Accordingly, the professional fees and costs incurred by the commission's special counsel were properly certified to the plaintiff cooperatives.

The proceedings in this case also differ significantly from those in which the commission intervened in the South Central Bell case. Unlike the utilities in that case, the utilities in this case were called before the commission. They are also parties to the proceeding that has resulted in the certification of expenses. Finally, the commission's proceeding in this case would have had a direct effect on the cooperatives' rates.

The judgment of the district court in favor of the commission on the fee issue ordered the cooperatives to pay 90% of the fees and expenses certified to them and 7/13 of the remaining 10%, with the remaining 6/13 certified pro rata to the other cooperatives involved in the commission's docket No. U-17753. Although the district judge

conclude that the fee award should be denied for the following reasons.

The issue was decided in South Central Bell Telephone Co. v. La. Public Services Comm'n, 412 So.2d 1069 (La. 1982), wherein it was determined that La. R.S. 45:1180 and 1181 did not authorize the commission to be reimbursed for attorney fees except in cases involving rate-making disputes. While La. R.S. 45:1180 and 1181 were amended by Act 561 of 1985, that amendment did not have the effect of broadening the types of cases in which the commission is entitled to attorney fee reimbursement. Instead, by amending R.S. 45:1180 and 1181, and enacting R.S. 45:1163.3, the Legislature created an economics and rate analysis division, and provided that in certain circumstances the commission could be reimbursed by parties examined by the economics and rate analysis division in rate-making matters. This case, a declaratory judgment action brought by the cooperatives, involves a jurisdictional dispute, not a rate-making examination by the economics and rate analysis division, so there is no statutory authority for an award of attorney's fees to the commission under these circumstances.

Therefore, the request of the commission to have the cooperatives cast for the fees that the commission incurred in defending this declaratory judgment action is denied.

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6. (Continued)

gave no reason for this division of the fees, the cooperatives did not challenge this allocation percentage as unreasonable. Nor did they challenge the fees as being unnecessary or arbitrary, except in the context of their broader argument that this proceeding was not one affecting services and rates. Since this case constitutes judicial review of a commission proceeding that began as a rate and services inquiry, this court should find no basis for refusing to uphold the lower court judgment in favor of the commission concerning the commission's certification of fees and costs to the cooperatives.

DECREE

Accordingly, the opinion of this court on original hearing is vacated, and the opinion of the district court concerning the jurisdiction of the commission is affirmed. The opinion of the district court awarding attorneys fees to the commission is reversed, and each party will bear its own costs.

SUPREME COURT OF LOUISIANA

NO. 88-CA-1719

CAJUN ELECTRIC POWER COOPERATIVE, INC., et al

versus

THE LOUISIANA PUBLIC SERVICE COMMISSION

WATSON, Justice, respectfully dissents, adhering to the views expressed in the original opinion and noting the following language from South Cent. Bell Tel. Co. v. Louisiana, Etc., 412 So.2d 1069 (La.1982):

> "The 1974 Constitution streamlined the language of the provision but essentially afforded the Louisiana Public Service Commission the same powers and duties which it had under the former constitution.
>
> * * *
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> "While the language of the 1974 Constitution is differnet from that in the 1921 Constitution, there was no intention on the part of the delegates to the 1973 Constitutional Convention, nor on the part of the citizens of the state who voted to adopt the 1974 Constitution to change the authority of the Public Service Commission. Delegate Louis Lambert reported to the Convention that 'the committee worked hard . . . not to make any substantive change basically in that provision. The reasons for that was that

apparently it had worked fairly well in the past. We didn't see any particular reason to tamper with it.' Volume IX. Records of the Louisiana Constitutional Convention of 1973 at 3008. Later in the discussion immediately preceeding final adoption of the provision, delegate Pat Juneau reiterated the intent to 'not make any change whatsoever in the present authority and jurisdiction of the Public Service Commission.' " 412 So.2d at 1072.

SUPREME COURT OF LOUISIANA

NO. 88-CA-1719

CAJUN ELECTRIC POWER COOPERATIVE, INC. ET AL

Versus

THE LOUISIANA PUBLIC SERVICE COMMISSION

(On rehearing)

CALOGERO, JUSTICE, subscribes to the majority opinion and assigns additional concurring reasons

I join the majority opinion's holding that electric cooperatives are subject to the jurisdiction vested in the Public Service Commission by the Louisiana Constitution, as well as its determination that the Commission is not entitled to an attorney's fee award in this case. With respect to both of these issues, I assign the following additional reasons.

The Constitutional Issue

In South Central Bell Telephone Co. v. La. Public Service Comm'n, 412 So.2d 1069 (La. 1982), the narrow constitutional question presented pertained to the power and authority of the Commission to "adopt and enforce reasonable rules, regulations and procedures." *Id.* at 1072. That case involved a dispute over whether the Commission had either constitutional or statutory authority to charge attorney fees to South Central Bell for the Commission's intervention in a federal lawsuit in the United States Court of Appeal, D.C.

Circuit. We did in that case note that the 1974 Constitution streamlined the language of the 1921 Constitution pertaining to the Commission. And in that case we did observe that the new constitutional article essentially provided the Commission the same powers and duties relative to the adoption and enforcement of rules, regulations and procedures that it had under the former constitution. Furthermore, in that same context (the dispute over attorney fees and the Commission's power to enforce rules, regulations and procedures), we quoted constitutional convention delegate Juneau expressing the intent "not to make any change whatsoever in the present authority and jurisdiction of the Public Service Commission." *Id.*, *quoting* Volume IX, Records of the Louisiana Constitutional Convention of 1973 at 3008.

However, that case did not entertain the question presented here, *i.e.*, the Commission's constitutional authority over electric cooperatives. When first we entertained that question after adoption of the 1974 Constitution, in Dixie Elec. Membership Co-op v. La. Public Service Comm'n, 509 So.2d 1002 (La. 1987), we pretermitted the issue as unnecessary to the decision in the matter before us, while nonetheless observing that the Commission's argument for constitutional authority over cooperatives was persuasive. *Id.* at 1007.

In my dissenting opinion on original hearing in this case, I expressed the view that cooperatives are subject to the constitutional regulatory authority of the Commission for essentially two reasons: (1) because electric cooperatives were statutorily defined as public utilities at the time that the convention delegates adopted Art. IV §21(B) of the 1974 constitution, giving the Commission exclusive regulatory authority over "all common carriers and public utilities," and (2) because I found "no contrary intention" in the constitutional convention debates, i.e., no expressed

intention not to have the cooperatives subject to the jurisdiction of the Commission under Art. IV §21(B).

Although I generally adhere to the views expressed in my dissent on original hearing and join in the majority's disposition of this issue on rehearing, I now believe that the result reached on rehearing is supported by considerations not fully addressed in my original dissent, considerations which I take the opportunity to address here.

Regarding the intentions of the delegates to the constitutional convention, I believe that the records of the convention debate are simply not dispositive on this issue. It is true, as noted in *South Central Bell*, and by Justice Cole's separate opinions in this case, that Delegate Juneau and others stated at various points during the debate that Art. IV §21(B) was not intended to effect a change in the law as regards the authority and jurisdiction of the commission. However, these delegate statements were made in the context of a general debate over whether the Commission should have inherent constitutional authority to regulate common carriers and public utilities, or whether *all* authority of the Commission to regulate common carriers and public utilities should be subject to legislative approval.

As noted in footnote two of the majority opinion on rehearing, delegate Juneau and others feared that the wording of Art. IV §21(B), *as originally proposed* (giving the Commission authority over "all common carriers and public utilities *as provided by law*") would strip the Commission of all of its constitutional authority and make all of its regulatory authority dependent upon the Legislature. Delegates Juneau and Arnette argued that, as worded in the proposal, the provision would effect a major change in the law, eliminating in all respects the constitutional regulatory power which the 1921 Constitution provided to the Commission. The convention delegates then passed Juneau's

amendment changing Art. IV §21(B) to its present form, providing the Commission authority over "all . . . public utilities." The adoption of this amendment prevented a major change in the law (making all constitutional authority of the Commission subject to legislative control), and provided the basis for statements by delegates such as Juneau to the effect that as amended, the article would not effect a change in the Commission's jurisdiction.

Leaving aside this general debate over whether the Commission should have constitutional authority to regulate common carriers and public utilities (as opposed to having their authority subject to legislative control), I find *no* discussion or consideration by the delegates of the issue which is presented by this case: whether the adoption of Art. IV §21(B), providing the Commission with regulatory authority over "all . . . public utilities," had the effect of subjecting to the Commission's regulatory authority those public utilities which were not specifically designated by the 1921 Constitution (as public utilities subject to the Commission's regulatory authority.) Nor was there consideration or discussion of the type of entity which falls within the category of "public utilities." Nowhere were the references to not changing the authority and jurisdiction of the Commission made with reference to whether cooperatives were or were not public utilities or were or were not now subject to the Commission's jurisdiction.

Notwithstanding the aforementioned language in *South Central Bell*, discussed in the context of a different issue, and notwithstanding the remarks of some convention delegates during a debate over an issue not presented here, it is an inescapable conclusion that Art. IV §21(B) *did* change the law in at least one significant respect. Under the 1921 Constitution, the Commission was given constitutional auth-

ority over only those types of public utilities and common carriers specifically delineated in Art. VI §4. As Justice Dennis stated in his dissenting opinion on original hearing, the 1974 constitutional provision, by eliminating the reference to specific types of carriers and utilities and generically providing that the Commission shall regulate all public utilities, "represents a marked shift in philosophy from the 1921 Constitution's public service commission section."

The import of this change is self-evident. The common carriers and public utilities subjected to the Commission's constitutional authority are no longer defined by the Constitution itself. Rather, the determination of what types of businesses fall within the generic phrase "all . . . public utilities" must be made by the courts. And we surely cannot resolve this issue properly on the simplistic assumption that the term "public utilities" as used in the 1974 Constitution includes only those public utilities which the 1921 Constitution specified as subject to direct regulation by the Commission, primarily because electric cooperatives did not exist in 1921, and also because if the delegates had intended the definition of "public utilities" to be so limited, presumably they would have said so (which they easily could have done through a verbatim reenactment of the 1921 Constitution).

Justice Cole's dissent on this issue rests on the premise that, in reality, we are still to be governed by Art. VI §4 of the 1921 Constitution, for the reason that Art. IV §21(B) of our present constitution is but a shorthand reenactment of the 1921 provision. This premise I do not accept. The 1974 provision is different in content and construction, and our task in this case has been to interpret the extant meaning of that provision.

In attempting to interpret the meaning of that provision it is appropriate to look at both the definition of "public utility," and existing legislation which in 1974 defined electric cooperatives as public utilities. Consideration of both of these factors leads me to the conclusion that the constitutional phrase "all . . . public utilities" includes electric cooperatives.

First of all, it is apparent that electric cooperatives do in fact share the common characteristics possessed by public utilities. While the term public utility perhaps has no precise definition, the majority opinion on rehearing (footnote 3) notes that the most common characteristics of such an entity include: providing a service essential to the public interest, providing that service to all who apply, at reasonable and non-discriminatory prices, and providing a service the nature of which lends itself to monopolization. A company which provides the essential service of home and business electrical power is a public utility in the most conventional sense that the term is used. F. Welch, Cases and Text on Public Utility Regulation at 2 (1968).

It has been argued that because cooperatives are privately owned by the users of the electricity, they need not be subject to the same degree of governmental regulation required for investor-owned electric utilities. Assuming, *arguendo*, that this is true, it is irrelevent for the purposes of the issue at hand. Even if cooperatives, due to differences in ownership or management structure, require less regulation than *other types* of public utilities, that does not mean that they are not public utilities in the first instance. As one commentator has noted, the inquiry into whether a company is a public utility turns upon the *nature* of the services provided by that company, not the structure of its management or ownership. See Welch, Cases and Text on Public Utility Regulation, *supra* at 4 ("the term 'public utility' . . . ,

by itself, . . . refers only to the *nature* of the business, not to its ownership or operation.") Furthermore, the 1974 Constitution makes no distinction, based on the amount of governmental regulation needed or otherwise, between kinds of public utilities, but simply provides that they all shall be regulated by the Commission.

Secondly, at the time that the 1974 constitutional provision was enacted, electric cooperatives were treated by statute as public utilities subject to the regulatory authority of the Commission. I agree with Justice Dennis that a legislative act cannot define a constitutional phrase, and therefore do not suggest that the existence of the legislative acts is dispositive of the overall issue. Yet in attempting to determine whether cooperatives are "public utilities," I find the fact that the Legislature had chosen to define them as such, a persuasive indication that a cooperative is in fact the type of entity traditionally considered to be a public utility. Furthermore, the fact that electric cooperatives had been statutorily defined as public utilities for three years prior to the adoption of the new constitutional provision could hardly have been a secret to the delegates to the constitutional convention.

The foregoing considerations convince me that electric cooperatives are subject to the Commission's constitutional authority to regulate "all . . . public utilities," and therefore I join the majority's ruling on that issue.

Attorney Fees

As noted at the outset of this opinion, I join the majority's decision to deny the Commission's claim for attorney's fees in this case.

The minority view on this issue, set forth by Chief Justice Dixon in footnote six to the majority opinion, is that 1985

La. Acts 561, §1 effected a change in the law by broadening the types of cases or legal disputes under which the Commission is entitled to recover a fee award. The implication of this argument is that Act 561 was designed to overrule or modify our holding in *South Central Bell*, wherein we held that La. R.S. 45:1180 & 1181 did not authorize a fee award to the Commission in a case that did not involve a rate making dispute. I strongly disagree with these arguments.

At the time *South Central Bell* was decided (1982), La. R.S. 45:1180 permitted the Commission to retain special counsel "in rate making cases or the judicial review thereof," and La. R.S. 45:1181 provided that "counsel may be retained and fees certified (1) to evaluate and review proposed rate increases, and (2) to represent the Public Service Commission in rate making cases or the judicial review thereof."

The title of Act 561 of 1985 recites that its purpose is "*to create an economics and rate analysis division of the Public Service Commission*" and "to provide for employing consultants and attorneys *to assist the economics and rate analysis division*; [and] to provide for payment of such services." To accomplish these purposes, Act 560 enacted a new statute, La. R.S. 45:1163.3, and amended two existing statutes, La. R.S. 45:1180 and 1181.

La. R.S. 45:1163.3(A) provides for the creation of the economics and rate analysis division "[i]n order to assist the commission in making an examination of the affairs of any person doing a public service or public utilities business in Louisiana concerning matters affecting services and rates charged Louisiana consumers . . ." §1163.3(B) empowers the Commission to hire outside counsel if the staff of the economics and rate analysis division "is unable or insufficient to assist the commission in matters affecting services and rates. . . ."

As amended, La. R.S. 45:1180 and 1181 further define and restrict the circumstances under which the *economics and rate analysis division* may retain outside counsel and may be reimbursed for outside counsel's services by a party examined in a rate making dispute. §1180 provides that "Attorneys or special counsel may be retained by the commission *to assist the economics and rate analysis division* for the purpose of evaluating and reviewing matters affecting services and rates charged by public utilities to Louisiana consumers and for representing the Public Service Commission in such cases or the judicial review therof." §1181 further provides that the Commission "shall employ only such ... attorneys or special counsel ... as are actually necessary *to assist the economics and rate analysis division* in conducting the examination," and that compensation for attorney services "shall be fixed according to the time actually devoted to the work of conducting the examination and making reports thereon."

Under these three statutes (newly enacted §1163.3 and §§1180 and 1181, as amended), the only instance in which the services of outside counsel may be retained, much less charged to a third party, is when legal assistance is required by the economics and rate analysis division. By statute, that division's function is to handle rate-making examinations for the commission, and outside attorneys may be retained only as "actually necessary to assist the economics and rate analysis division in conducting the examination." §1181.

It is undisputed that this case does not involve a rate making examination by the economics and rate analysis division. This is a jurisdictional dispute between the cooperatives and the Commission. There is no statutory basis for authorizing payment of attorney fees to the Commission under these circumstances, just as there was no statute which authorized the fee award sought in *South Central Bell*. I find

nothing in the plain wording of the statutes which even hints that Act 561 was intended to overrule or modify our holding in *South Central Bell*, and no legislative history supporting such an intention has been cited. To the contrary, it appears that the purpose of Act 561 was simply to create an economics and rate analysis division for the stated purposes of handling rate making examinations, and to *continue in force* the provisions of §§1180 and 1181 which, both before and after Act 561, authorized the Commission to retain and be compensated for outside attorney services in rate making disputes.

Finally, one of my dissenting brethren argues in his concurring and dissenting opinion that there is "irony" and a "fundamental fallacy" in the majority's decision to deny an attorney fee award based upon its interpretation of the pertinent statutes, while at the same time holding that the Legislature has no power to restrict the constitutionally based regulatory authority of the Commission. This argument ignores the fact that there is no *constitutional* authority for the Commission to collect attorney fees, as we explicitly held in *South Central Bell, supra*. So any such authority must be provided by statute, and the statutes relied upon by the Commission do not apply to this case. On the other hand the question of whether the Commission has constitutional authority to regulate electric cooperatives is a matter separate and distinct from whether the Commission may charge or be entitled to attorney fees. It is simply not contradictory for the majority to conclude that while the Commission has constitutional authority to regulate cooperatives, it has no authority, by the constitution under any circumstances or by statute in this particular case, to collect attorney fees. The simple fact is that the Commission has no constitutional authority regarding attorney fees. So the majority's determination that the statues do not permit a fee award in this case cannot logically be interpreted as inconsistent with its separate determination that the Commission has regulatory power over the cooperatives that is based in the constitution.

SUPREME COURT OF LOUISIANA

No. 88-CA-1719

CAJUN ELECTRIC COOPERATIVE, INC., et al

Versus

LOUISIANA PUBLIC SERVICE COMMISSION

On Rehearing

DENNIS, J., expressing additional reasons.

I join in the majority opinion on rehearing for the reasons expressed therein and also for the reasons expressed in my dissenting opinion on original hearing. The constitutional grant of regulatory powers to the public service commission over all common carriers and public utilities is an exception to the plenary power of the legislature. Consequently, legislatively enacted rules of statutory construction and former legislative treatment of cooperatives as entities subject to regulation cannot affect this court's separate, independent and exclusive judicial power to interpret the constitution's meaning of "common carrier" or "public utility". Therefore, I construe the court's discussion of legislated law to be analogical and supplementary, and not essential, to its opinion.

SUPREME COURT OF LOUISIANA

No. 88-CA-1719

CAJUN ELECTRIC COOPERATIVE, INC., ET AL.

Versus

LOUISIANA PUBLIC SERVICE COMMISSION

ON REHEARING

COLE, JUSTICE, Dissenting in Part and Concurring in Part.

At the beginning of its opinion, the majority notes that under the Civil Code "when a law is clear and unambiguous *and its application does not lead to absurd consequences*, the law shall be applied as written . . . ." La. C.C. art. 11 (emphasis added). If, as the majority asserts, the provisions of La. Const. Art. IV, sec. 21(B) are "unambiguous," it is difficult to understand why this Court has been compelled to hear this matter twice and why it has arrived at two contradictory conclusions. Moreover, the majority's result leads to consequences that may be termed "absurd," and these future difficulties are foreshadowed by the logical inconsistencies of the majority opinion. Accordingly, I respectfully dissent on the jurisdictional issue.

The linchpin of the majority opinion is, unfortunately, a logical paradox. In footnote 3, the majority states: "[W]e base our decision in this case on the existence since 1970 of a *legislative definition* of electric cooperatives as public utilities . . . ." In virtually the same breath, however, it concludes the 1974 Constitution "removes the ability of the

legislature to alter the commission's jurisdiction" because of the "plenary authority" of the Public Service Commission. Slip Opinion at 1. The majority does not explain how the legislature can be at once the source of the commission's regulatory jurisdiction over cooperatives and at the same time powerless to legislate on this question under the constitution because the commission is the sole power. The rest of the majority opinion constitutes an attempt to justify this initial fallacy.

The majority opinion attempts to resolve this fundamental paradox by the argument that the 1974 Constitution somehow "froze" the extant legislation concerning commission jurisdiction over electric cooperatives into Article IV, sec. 21(B). Several factors militate against such a conclusion.

Most significantly, neither the language nor the history of Section 21(B) reflects any intent to lock the existing statutory regulatory scheme into the constitution. The majority is correct when it notes the framers sought to preserve the "status quo" in Art. IV, sec. 21(B). It is obvious, however, that the status quo to be preserved was the allocation of power between the commission and the legislature under the 1921 Constitution, *not* the statutory regulatory scheme in place in 1973. As Justice Calogero observed in *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, the 1974 Constitution "streamlined" the language of the 1921 Constitution but the power, authority and duties of the Public Service Commission remained unchanged. 412 So.2d 1069, 1072 (La. 1982). Delegate Juneau, who proposed the language that became Section 21(B), and upon whose remarks the majority places great weight, made this abundantly clear:

> The amendment which I proposed is not to make any change whatsoever in the present

> authority and jurisdiction of the Public Service Commission. Whatever act you may have passed in the legislature relating to the Public Service Commission, could be passed in 1975, 1976 or '77 . . . . If you have authority in the legislature to pass an act relating to the Public Service Commission, whatever those acts are today, I think you would have the same authority under this amendment to pass that type of legislation.

IX *Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts* 3347 (105th Days Proceedings; December 20, 1973). In 1978, the legislature exercised "the same authority under this amendment" to again exempt the rural electric cooperatives form commission control.[1]

The majority's holding that the 1974 Constitution elevated an existing statutory scheme to the level of constitutional law represents a frightening and unprecedented aberration in constitutional interpretation. The plain language of sec 21(B) does not support this claim, nor does the history of the constitutional convention debates. Absent any such authoritly, I can find no precedent in our jurisprudence for finding

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1. 1978 La. Acts 77, codified as amended at La. R.S. 45:1163. The 1978 legislation was not a new trend in the history of regulation of electric cooperatives in Louisiana. In 1940, the legislature passed Act 266, which comprehensively dealt with rural electric cooperatives. Section 25 provided: "Cooperatives transacting business in this State pursuant to this Act shall be exempt in all respects from the jurisdiction and control of the Public Service Commission of this State." Subsequent legislation confirmed this legislative policy. *See, e.g.*, 1942 La. Acts 314; 1948 La. Acts 480. In the 49 year history of laws relating to cooperatives in this state, the Public Service Commission has exercised jurisdiction over them for eight years (1970-1978) and that jurisdiction was conferred by legislative act: Act 34 of 1970.

that because the commission had jurisdiction over the co-operatives by virtue of a legislative act in existence in 1974, the legislature is powerless to enact legislation altering its prior enactment.

Does the majority opinion not prevent the legislature from altering its own prior enactment? Logically speaking, it does.[2] Yet, can anyone seriously contend the legislature does not have the plenary power to amend its prior enactment concerning cooperatives? Nowhere in the Constitution is the legislature prohibited from doing so. Absent clear and convincing evidence that it was the constitutional aim to deny the legislature the power to modify the law in existence in 1974, our jurisprudence clearly establishes the legislature retains this power. *See* Board of Directors of Louisiana Recovery District v. All Taxpayers, Property Owners and Citizens of the State of Louisiana, 529 So.2d 384, 387-388 (La. 1988) (per Dennis, J.).

Equally unpersuasive is the majority's reliance on the fact that the framers of Article IV, sec 21(B) did not expressly

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2. In fact, taken to its logical conclusion, the majority's rationale embeds in the Constitution *all* statutes in existence in 1974. The majority can point to nothing in the language or the history of Section 21(B) that indicates a particularized intent of the framers to "freeze" only certain statutes relating to the commission into the Constitution. It therefore follows that if the statutes in existence in 1974 relative to the power of the commission are now part of the Constitution, this must be the result of some heretofore undiscovered general rule incorporating all the statutes then in existence into the Constitution. To state this proposition is to demonstrate its legal "absurdity."

exempt electric cooperatives from commission jurisdiction.[3] It is similarly undisputed that the framers did not expressly define cooperatives as public utlities and place them under the commission's constitutional jurisdiction. The argument from silence cuts both ways. Where the Constitution is silent, the otherwise plenary power of the legislature prevails. As we observed in *Guillory v. Department of Transportation and Development*: "It is a fundamental principle of judicial interpretation of state constitutional law that the legislature is supreme except when specifically restricted by the Constitution." 450 So.2d 1305, 1308 (La. 1984); *see also* Board of Directors of Louisiana Recovery District, supra.

In seizing upon the 1970 statute granting the commission regulatory power over cooperatives to justify its result in this case, the majority ignores prior decisions of this Court. In *Central Louisiana Electric Co. v. Louisiana Public Service Comm'n*, 251 La. 532, 205 So.2d 389 (1967), we held electric cooperatives were not subject to the commission's inherent power under the 1921 Constitution. *Accord*, Central

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3. The majority's observation that the framers specifically exempted municipally-owned utilities from the commission's jurisdiction is inapposite. This exception was clearly created to serve the interests of intrastate comity, and simply reflects a policy decision to leave municipalities free to regulate purely local entities. Both the language and history of Section 21(C) indicate this provision was not intended as a listing of all entities conceivably designated as "public utilities" that are to be exempt from commission jurisdiction. To conclude otherwise is to assume the framers were acting as a legislature and making legislative policy decisions on the need for regulation in all entities conceivably classifiable as public utilities. Were this true, the framers need not have eliminated the "laundry list" of entities to be regulated found in Art. VI, sec. 4 of the 1921 Constitution. Finally, the inclusion of the "as provided by law" phrase in sec 21(B) indicates the framers foresaw situations just like the present one where the question of whether to create commission jurisdiction is a policy matter properly for the legislature.

Louisiana Electric Co. v. Louisiana Public Service Comm'n, 253 La. 553, 218 So.2d 592 (1969). In *South Central Bell Telephone Co.*, supra, we held the 1974 Constitution did not change the authority of the Public Service Commission. 412 So.2d at 1072. Justice Calogero noted: "While the language in the 1974 Constitution is different from that in the 1921 Constitution, there was no intention on the part of the delegates to the 1973 Constitutional Convention, nor on the part of the citizens of the state who voted to adopt the 1974 constitution to change the authority of the Public Service Commission." Id., Since the Commission therefore had no inherent authority over cooperatives under the 1921 Constitution, and since the 1974 Constitution did not change the authority of the commission, it follows logically that the commission has no inherent, "plenary" authority over electric cooperatives under the 1974 Constitution. The majority does not rebut or even confront this formidable obstacle; it simply ignores it.

The majority opinion also fails to address the problem of the commission's acquiescence in the legislature's decision to exempt electric cooperatives from commission jurisdiction. From 1970 to 1978, the commission regulated cooperatives under a statutory grant of power. By 1978 La. Acts 77, the legislature went back to the pre-1970 regulatory scheme and exempted the cooperatives from commission control under the conditions set out in the statute.[4] From 1978 to 1987, the commission acquiesced in the legislature's decision.

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4. The commission was, of course, aware of the actions of the legislature in 1978 and the effect of the proposed legislation to re-exempt electric cooperatives from commission jurisdiction. Commissioner Lambert and two other members of the commission appeared before the House Committee on Commerce to testify against S.B. 557 which became Act 77 of 1978. House Committee on Commerce, Minutes of Meeting of June 7, 1978 at 6-7.

In several letters to the cooperatives that are in the record below, the commission disclaimed regulatory jurisdiction over them on the basis of R.S. 45:1163. This Court has previously found that such acquiescence in an established regulatory scheme by the alleged regulator is persuasive evidence of the correctness of the existing regulatory plan. *See* State v. City of New Orleans, 91 So. 533 (La. 1922).[5] Here, we are asked to "discover" a new source of plenary power in the commission, yet the majority fails to address the issue of its acquiescence for 10 years in the legislative enactment it now challenges.[6]

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5. In *State v. City of New Orleans*, the Court quoted with approval the opinion of Justice Lamar in *United States v. Midwest Oil Co.*, 236 U.S. 466 (1914):

> It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the executive [or legislative] department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystalize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

91 So. at 538-539. The commission's repeated denials that it has regulatory jurisdiction over the cooperatives is entitled to similar weight here even though "the validity of the practice is the subject of investigation" in this case.

6. In fact, under our *South Central Bell* ruling that the 1974 Constitution did not alter the power of the commission, its acquiescence in legislative jurisdiction over the regulation of cooperatives really dates back to 1940 when cooperatives were first statutorily exempted from commission jurisdiction.

In light of the logical fallacies generated by the majority in its attempt to justify its result by constitutional analysis, it is small wonder that it descends into the murky realms of public policy and regulatory economics in an attempt to justify its conclusion. The majority implicitly rejects the finding of the Utah Supreme Court in the seminal *Garkane* decision,[7] i.e., that regulation of electric cooperatives is not necessary because of the identity of interests between producer and consumer. But the majority offers no countervailing analysis. The *Garkane* court's economic observations are borne out by the record in this case which shows the high degree of managerial control exercised by the members of the cooperatives before us. The majority does not discuss the managerial and economic picture presented in this case. Rather, it decides, on a theoretical level, that pervasive government regulation of electric cooperatives is necessary to attain some abstract "good."

The majority then attempts to piggy-back its policy determinations onto its constitutional analysis by stating it declines to second-guess the judgment of the constitutional framers who did not expressly exempt cooperatives from commission jurisdiction. The circle is complete and the majority is left with the weak argument from silence criticized above.

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As regards the issue of attorney fees, I concur with the decretal portion of the opinion reversing the award by the

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7. Garkane Power Co. v. Public Service Comm'n, 98 Utah 466, 100 P.2d 571 (1940). The Utah court's analysis was followed by the U.S. Court of Appeals, D.C. Circuit, in *Salt River Project Agricultural Improvement and Power Dist. v. Federal Power Comm'n*, 391 F.2d F.2d 470 (1967), cert. denied, sub nom. *Arkansas Valley G & T, Inc. v. Federal Power Comm'n*, 393 U.S. 857 (1968).

trial court. The opinion, as originally presented to the court by its author, proposed the language now relegated to footnote six. A signatory to the jurisdicitonal issue, apparently seeking to bolster the opinion by avoiding the necessity of dissenting in part, sought the inclusion of the material now in the body of the opinion. This cosmetic effect nonetheless leaves only three justices of the "majority" adhering to the denial of fees. Although a majority has finally adopted the view of the attorney fee issue to which I have consistently adhered throughout the pendency of this matter before the court, the fundamental fallacy in the majority's analysis of the jurisdictional question remains.

With no apparent sence of irony, this court decides the legislature has the power to restrict the commission's assessment of attorney fees by statute, while at the same time the court holds the same legislature has no authority to statutorily limit the commission's "plenary authority" to regulate electric cooperatives.[8] This tension between the positions is almost palpable and underscores the weakness of the majority's position on the jurisdictional issue. Justice Calogero, in his additional concurring reasons, makes a vain attempt to reconcile this central paradox of the majority opinion. His efforts fail because *if* the commission's regulatory power is "plenary" as the majority asserts, it does not need additional explicit constitutional authority to tax its attorney fees by fiat. To conclude otherwise is to rob the phrase "plenary authority" of meaning and remove the main support for the majority's conclusion on the constitutional issue. Faulty, post hoc rationalizations to justify a predetermined result are no substitute for logical reasoning.

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8. This contradiction is unavoidable in light of our holding in *South Central Bell Telephone Co., supra*, that the commission possessed no inherent power to assess attorney fees and can do so only by an express grant of authority from the legislature. 412 So.2d at 1073.

In addition, if there is any question as to how the Public Service Commission interprets its "plenary authority" in the context of legislative enactments, one need only observe its actions with respect to the Public Records Act. *See*, f.n. 10 of these reasons, infra. It obviously does not believe its "plenary authority" pertains only to its regulatory jurisdiction.

Assuming, *arguendo*, that R.S. 45:1163.3 and 45:1180-1181 are still constitutionally sound, these statutes do not justify taxing the membership of the plaintiff cooperatives with the commission's attorney fees. To so hold would be to ignore the declaratory nature of the relief requested. All the cooperatives sought was a declaration on the constitutionality of a statute: R.S. 45:1163. R.S. 45:1180-1181 only permit the commission to tax attorney fees in "investigations" by the commission's "economics and rate analysis division" in "matters affecting services and rates." The relationship between the threshold question of the constitutional, declaratory judgment action and electric services and rates is extremely tenuous.[9]

It is clear from the record that the fees counsel for the commission seeks were not incurred in the course of "an examination of the affairs" of these cooperatives "concerning matters affecting services and rates." R.S. 45:1180(A). Mere intent to regulate is insufficient. The commission incurred the fees while seeking to have R.S. 45:1161 declared un-

9. Finding a nexus here would require an unconscionably broad reading of the statutory authorization of R.S. 45:1180. Since all costs taxed to the cooperatives are ultimately passed on to their members, *any* expense the commission imposes may be said to "affect" the rates the cooperatives charge their membership. Such a holding is not in keeping with a *pari materia* reading of R.S. 45:1180(A) and (B). Section A imposes clear limits on the type of services which the commission can pass on under Section B.

constitutional in a suit seeking a declaration of constitutionality filed by the cooperatives. The fees to be taxed must also be incurred to "assist the economics and rate analysis division" in conducting this "examination." Id. Counsel for the commission admitted the commission's "economics and rate analysis division" does not exist in reality. Finally, it is circular to say that fees are properly taxed to the cooperatives since the cooperatives are public utilities under the plenary jurisdiction of the commission. That was the question presented in this declaratory judgment action; it does not involve matters relating to services or rates.

R.S. 45:1181 is properly read in *pari materia* with R.S. 45:1180, and it imposes additional restrictions on the commission's power to tax fees. Under R.S. 45:1181, the attorneys employed to assist the economics and rate analysis division must be "actually necessary" to the "examination." Furthermore, the compensation due these outside employees depends on time spent "conducting the examination and making reports thereon" or "as participants in any judicial review of the examination or reports." R.S. 45:1181(A). In this case, the attorneys for the commission claim fees for the litigation of the threshold jurisdictional question; no "examination" of the cooperatives has taken place nor have "reports" been prepared. Furthermore, this is not a case involving judicial review of a commission "examination" since no "examination" has taken place. Accordingly, R.S. 45:1181 does not authorize the taxing of fees given the procedural posture of this matter.

R.S. 45:1181 requires that the fees be "reasonable." At present, three attorneys have allegedly been employed by the commission and they have incurred fees in excess of $100,000.00. These fees, which will be passed on to consumers, have not been subjected to close judicial scrutiny as to their "reasonableness." Nor has it been demonstrated that

the services are "actually necessary to assist the economics and rate analysis division" in an "examination" of the cooperatives. R.S. 45:1181(A). Likewise, it has not been demonstrated that the three attorneys are "actually necessary" The cooperatives properly filed a Rule under R.S. 45:1181(B) challenging the fee assessment. This Court, under its authority to regulate the practice of law, has seen fit to question the reasonableness of attorney fees sought in other cases. *See, e.g.*, City of Baton Rouge v. Stauffer Chemical Co., 500 So.2d 397 (La. 1987); Leenerts Farms, Inc. v. Rogers, 421 So.2d 216 (La. 1982). This Court certainly owes it to the consumers who must ultimately pay the substantial fees involved here to subject these fees to close judicial scrutiny. For all these reasons, I agree that the commission has no authority to tax its attorney fees to the plaintiff cooperatives.

* * * * *

The logical problems that mark the majority opinion are an inevitable consequence of the result it strives to reach. By concluding the commission's power over electric cooperatives is at once the product of a 1970 legislative act and at the same time the product of the commission's "plenary authority" under the 1974 Constitution, the majority sets out a self-contradictory proposition. In such a situation, one should examine the soundness of one's premises since both cannot be true.

The majority seems oblivious of the potential sweep of its holding in this case. The constitutionality of virtually all legislation pertaining to the Public Service Commission is highly suspect in light of the majority's newly discovered "plenary authority." At the same time, however, the majority relies on statutes that conflict with the commission's "plenary" power in denying attorney fees to counsel for the commission. This opinion raises more questions than it answers. Do the protections of the Louisiana Public Records

Act apply to the Commission?[10] Are the other provisions of Title 45 of the Revised Statute relating to public utilities and common carriers valid or do they fall before the "plenary authority" of the commission?[11] This Court will be forced to resolve these and other troublesome questions in light of the grim spectre raised by this opinion of a "Fourth Branch of Government" not subject to any legislative act it deems contrary to its "plenary authority." These are but a few of the "absurd consequences" that result from the majority's reading of Article IV, sec. 21(B).

The majority's decision is contrary to settled rules of constitutional interpretation. It is logically inconsistent, unsupported in light of statutory and jurisprudential law, and unsupported by the record in this case. Accordingly, I am compelled to dissent.

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10. The commission has already denied that it is subject to this generally applicable act designed to assure open and honest government. *See* State of Louisiana ex rel. Guste, Attorney General v. Louisiana Public Service Comm'n, No. 337, 947 (19th Judicial District Court, 1988). After the trial court ruled against the commission, the commission "adopted" the Act's provisions as its own rules.

11. *E.g.*, R.S. 45:122-125 (electric utilities); R.S. 45:1-10 (airplanes); R.S. 45:61-71 (canals); R.S. 45:161-200 (motor carriers, particularly 45:172 which exempts certain "carriers" from commission regulation); R.S. 45:321-621 (railroads); R.S. 45:671-736 (street railroads); R.S. 45:781-804 (telephones); R.S. 45:1351-1504 (radio and television); and see in particular R.S. 45:841-1244 (general provisions applicable to all carriers and public utilities).

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

301 LOYOLA AVE., 70112
TELEPHONE 504-568-5707

June 15, 1989

John Schwab, Esq.
SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, La. 70810

Re: CAJUN ELECTRIC POWER COOPERATIVE INC., ET AL
vs. THE LOUISIANA PUBLIC SERVICE COMMISSION
No. 88-CA-1719

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgment is now final. By copy of this letter we are advising the clerk of court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very Truly yours,

s/s Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

FJLJr:dhl
Enclosure
ccs: Hon. Douglas Gonzales
Hon. H. M. "Mike" Cannon
James J. Thornton, Esq.
James B. Supple, Esq.
Bernard E. Boudreaux, Jr., Esq.
James J. Davidson, III, Esq.
William Shaw, Esq.
Wendell Miller, Esq.
Rudolph McIntyre, Esq.
James Funderburk, Esq.

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 56-A

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *15th day of June, 1989*, the following action was taken by the Supreme Court of Louisiana in the case listed below:

REHEARING DENIED:

88-CA-1719 Cajun Electric Power Coopertive Inc., et al v. Louisiana Public Service Commission, Inc.
MARCUS, WATSON & COLE, JJ., would grant a rehearing.

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER REAFFIRMING COMMISSION JURISDICTION OVER ELECTRIC COOPERATIVES TRANSACTING BUSINESS IN LOUISIANA

SPECIAL ORDER 8-87

(illegible)
RECEIVED
SEP 8 1987
(stamp)

In re: Louisiana Public Service Commission's Exercise of Jurisdiction Over Electric Cooperatives Transacting Business in the State of Louisiana

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Article 4 §21(B) of the Louisiana Constitution of 1974 provides that the Louisiana Public Service Commission "shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law." That constitutional provision grants the Commission plenary power to regulate all public utilities and that power may not be restricted by legislative act. Only a constitutional amendment may limit the Commission's authority. At the time the 1974 Constitution was drafted and adopted, electric cooperatives transacting business in the State were defined as electric public utilities (La. R.S. 45:121 (as amended by La. Acts 1970, No. 34)) and were thus subject to Commission regulation.

Although the Commission's constitutional authority to regulate all public utilities has not been changed, apparently some confusion exists as to whether the Commission's jurisdiction over electric cooperatives has been restricted. In 1978 the legislature amended La. R.S. 45:1163 and purported to limit the Commission's authority to approve the rates charged by electric cooperatives if certain conditions were met. No constitutional changes were made. Although the Commission was therefore still possessed of plenary authority over the cooperatives, it did, for a time, defer from actively exercising its rate jurisdiction over the cooperatives. Subsequently, in 1984, the legislature again amended La. R.S. 45:1163 to permit the members of electric cooperatives to vote to subject the cooperatives to the full jurisdiction of the Commission. Seven cooperatives have voted affirmatively to submit to Commission jurisdiction pursuant to La. R.S. 45:1163. They are Beauregard Electric Cooperative, Inc., Bossier Rural Electric Membership Corporation, Concordia Electric Cooperative, Inc., Dixie Electric Membership Corporation, Pointe Coupee Electric Membership Corporation, Valley Electric Membership Corporation and Washington-St. Tammany Electric Cooperative, Inc. Six electric distribution cooperatives, Claiborne Electric Cooperative, Inc., Jefferson Davis Electric Cooperative, Northeast Louisiana Power Cooperative, Inc., South Louisiana Electric Cooperative Association, Southwest Louisiana Electric Membership Corporation and Teche Electric Cooperative, Inc. have not taken this action.

Apparently because of the legislative revisions to La. R.S. 45:1163 discussed above, some of the cooperatives believe that the Commission is deprived of its regulatory authority over the electric cooperatives unless an affirmative vote is taken pursuant to La. R.S. 45:1163. This belief is incorrect. The Commission's constitutional authority to regulate the activities of all electric cooperatives operating in

this State is intact. In the absence of a constitutional amendment, the regulatory power of the Commission may not be circumscribed.

The rates charged by electric cooperatives in Louisiana, on average, are approximately 50 per cent higher than those paid by customers of investor owned utilities in the State. In some instances cooperative customers pay almost twice as much as customers of investor owned companies for their electricity. At least one cooperative has sought the protection of the federal bankruptcy court. Because of these and other problems facing the cooperatives and their customers the Commission believes that it must reaffirm its jurisdiction over the cooperatives and actively regulate the rates charged and services provided by those entities.

At its open session held on August 18, 1987, the Commission unanimously voted to assume jurisdiciton over all of the electric cooperatives operating in the State and to exercise that jurisdiction over the rates charged by those cooperatives. Therefore,

IT IS ORDERED, that the Commission, pursuant to the authority granted it by the Louisiana Constitution, reaffirms its regulatory authority including its authority to fix reasonable rates and regulate service, and will exercise its jurisdiction over the electric cooperatives operating in Louisiana. This exercise of jurisdiction extends to the following cooperatives: Beauregard Electric Cooperative, Inc., Bossier Rural Electric Membership Corporation, Claiborne Electric Cooperative, Inc., Concordia Electric Cooperative, Inc., Dixie Electric Membership Corporation, Jefferson Davis Electric Cooperative, Northeast Louisiana Power Cooperative, Inc., Pointe Coupee Electric Membership Corporation, South Louisiana Electric Cooperative Association, Southwest Louisiana Electric Membership Corporation and Teche

Electric Cooperative, Inc., Valley Electric Membership Corporation and Washington-St. Tammany Electric Cooperative, Inc.

The staff and legal counsel of the Commission are directed to institute proceedings to examine the rates charged and service rendered by these cooperatives.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
SEPTEMBER 3, 1987

/s/ JOHN F. SCHWEGMANN
CHAIRMAN

/s/ DON OWEN
VICE CHAIRMAN

/s/ LOUIS J. LAMBERT, JR.
COMMISSIONER

/s/ THOMAS E. POWELL
COMMISSIONER

/s/ GEORGE J. ACKEL
COMMISSIONER

/s/ (illegible)
SECRETARY